

PERMANENT COURT OF ARBITRATION

ARBITRATION UNDER ANNEX VII OF THE 1982 UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA

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In the Matter of Bay of Bengal Maritime Boundary
Arbitration Between:

THE PEOPLE'S REPUBLIC OF BANGLADESH

PCA Case No. 2010-16

and

PCA Reference BD-IN

THE REPUBLIC OF INDIA

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Volume 2

HEARING ON THE MERITS

Tuesday, December 10, 2013

The Permanent Court of Arbitration
PCA Administrative Council Chamber/
"Japanese Room"
Carnegieplein 2, 2517 KJ The Hague
The Netherlands

The hearing in the above-entitled matter convened at 10:00 a.m. before:

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JUDGE JEAN-PIERRE COT, Arbitrator

JUDGE THOMAS A. MENSAH, Arbitrator

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1 would have you locate the base points – all of them underwater. Why? The only
2 possible answer is that even India accepts that they cannot be located on dry land.

3 2. Bangladesh reluctantly accepts that one way to approach this delimitation is to try
4 to draw a provisional equidistance line. But, as you will no doubt have begun to
5 understand, the instability and the concavity of the coastline will make it a difficult
6 task to construct such an equidistance line that reflects the reality of the coastal
7 area.¹ In this speech I will develop Bangladesh’s argument for adopting a more
8 appropriate solution. The concavity of the coast inevitably makes any equidistance
9 boundary inequitable to Bangladesh, so even an equidistance line would have to be
10 adjusted in order to ensure an equitable solution, as it was adjusted in the
11 *Bangladesh/Myanmar case*². Bangladesh has consistently argued that equidistance
12 cannot provide the equitable solution envisaged by Articles 15, 74 and 83 of the
13 Convention. It made that argument in the *Bangladesh/Myanmar* case and it does so
14 again in this case.

15 3. But there is another way to ensure an equitable solution, and Bangladesh invites the
16 tribunal to adopt that other way in this case: and that is the angle-bisector method.
17 Bangladesh has already set out its arguments with respect to the use of this method
18 in the Memorial, and it reiterated them in its Reply. Yes, it is true that in the
19 *Nicaragua/Colombia Case*³ the ICJ did not apply the angle-bisector method – but
20 it wasn’t asked to do so, and in the circumstances of that case it would not have

¹ BR para 1.21.

² *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012.*

³ *Territorial and Maritime Dispute (Nicaragua/Colombia), Judgment, I.C.J. Reports 2012 ---.*

1 been relevant. It is also true that in the *Bangladesh/Myanmar* case the ITLOS
2 declined to apply the angle-bisector method. The Tribunal’s reason for not
3 accepting Bangladesh’s argument in that case was set out in paragraph 237 of the
4 Judgment, if I could just remind you what it was. The Tribunal said:

5 “Bangladesh’s approach of constructing the angle at the
6 terminus of the land boundary between the Parties with reference to the
7 ends of their respective relevant coasts produces a markedly different
8 bisector once it is recognized that Myanmar’s relevant coast extends to
9 Cape Negrais, as decided by the Tribunal in paragraph 203.”

10 The Tribunal went on – and I think this is a key point -

11 “The resultant bisector fails to give adequate effect to the
12 southward projection of the coast of Bangladesh.”

13 4. The Tribunal then at paragraph 239 concluded that “in the present case the
14 appropriate method to be applied for delimiting the exclusive economic zone and
15 the continental shelf...is the equidistance/relevant circumstances method”⁴ .
16 Notice they said “in the present case,” clearly referring to the circumstances of that
17 delimitation.

18 5. And, of course, those cases are not this case, and in the particular circumstances of
19 this case, there remain, we would submit, good reasons for continuing to believe
20 that the angle-bisector method is more appropriate than the provisional
21 equidistance method as a means for securing an equitable solution of the dispute.

⁴ Para 239.

1 6. Mr. President, members of the tribunal, my speech is in three parts, and I, therefore,
2 have three submissions to make this morning. First, that the geography of the
3 relevant coastline is sufficiently unstable to make it difficult and unwise to locate
4 reliable base-points from which to draw any version of an equidistance line.
5 Professor Akhavan has already been over the details of this. I will do no more than
6 remind you of the key points. But it will be obvious in this context that India's
7 choice of base-points is fundamentally unsuitable. If the tribunal has to use
8 base-points, then, we would submit, that those proposed by Bangladesh are
9 preferable – but we would also say that even those are going to be problematic for
10 you.

11 7. Secondly, I would argue that the case law supports the use of the angle-bisector
12 method in the circumstances of this case. Indeed, I would submit, it does so more
13 strongly than any of the other cases where that method has been employed. The
14 apparent non-adoption of the angle bisector in *Bangladesh/Myanmar* and its
15 irrelevance in *Nicaragua/Colombia* tells us only that in those cases the
16 circumstances were different. It does not tell us that the angle-bisector method
17 should not be employed where it is more appropriate.

18 8. Finally, my third submission I will argue the use of the angle-bisector method is
19 more appropriate in this case, both because it reflects the geographical reality, and
20 because it is better suited to the equitable solution of the present dispute. I will then
21 go on to explain to the Tribunal how Bangladesh proposes that you should employ
22 the angle bisector to secure the equitable solution required by the Convention.

1 9. Let me begin with the geography very briefly. The geography of this case is quite
2 unlike any other maritime boundary dispute. The overall concavity of the coast
3 makes any equidistance line inherently inequitable, but that is not new. The
4 unparalleled instability of the deeply indented delta coastline makes any
5 equidistance line inherently inappropriate. That is new and so is the combination of
6 these two fundamentally geographical circumstances.

7 10. Professor Akhavan has explained the geography of the Bengal Delta, and he's told
8 you how erosion of the low-lying Bangladesh coast is a continuing and significant
9 problem. India's own Geological Survey has drawn attention to the rapid erosion of
10 the Sundarbans and the loss of mangrove forests⁵. Current rates of loss are double
11 the historic rate of loss over the past two hundred years⁶. This will result over the
12 long-term in a major re-orientation of the Bengal Delta⁷. The rising sea levels in the
13 Bay of Bengal, of course, do not help⁸. As you will have noticed, all of the base
14 points selected by India are now underwater, while those selected by Bangladesh
15 have also suffered serious erosion and they may eventually follow suit. For you to
16 decide where the coastline is located is not going to be easy in these circumstances.

17 11. India does dispute some of these points, including the rate of sea level rise and the
18 loss of mangrove forests⁹. It seems to suggest that the problems are
19 over-dramatised, and that Bangladesh has got its science wrong. Yet it sees no need

⁵ Geological Survey of India, "Endangered Sundarbans", Annex BR15.

⁶ BR para 2.28.

⁷ BR para 2.29.

⁸ BR para 2.28.

⁹ IR para 4.25-41.

1 to refute Bangladesh’s arguments with any expert evidence. And – and I think this
2 is the crucial point – while India attempts to explain away the instability of the
3 Bengal Delta, it does, nevertheless, accept that there is erosion, accretion and
4 instability. I would invite you just to look at paragraph 4.33 of India’s Rejoinder,
5 where it says this, and I’ll quote briefly: “Changes in the coastline induced by
6 erosion and accretion are caused by such short-term natural events as storm surges,
7 wave action and winds, or in response to long-term events such as sea level changes
8 or tectonic events. Excluding the impact of human activity, these processes, they
9 say, are simply natural evolutionary phenomena.” Natural evolutionary phenomena
10 – well, yes, indeed, they are, of course - but that does not alter the reality that they
11 cause erosion and instability¹⁰. In the next paragraph India goes on to point out the
12 role of human activities inducing coastal erosion. While I suppose you could say
13 that human activities may not be natural – I’m not sure I’d necessarily agree with
14 that if I was a philosopher – but even that does not make the coastline any less
15 unstable. It merely emphasizes how vulnerable this coastline is. Then at paragraph
16 4.38 India says that what matters is not whether mangroves counter erosion, but
17 “the reduction in the coverage area of mangrove forests that negatively affects
18 erosion.”

19 12. Well, Mr. President, I do not doubt that my friends opposite have expertise in
20 mangrove swamps, but does it matter why the erosion occurs? What matters is that
21 it does occur, and in these paragraphs India admits as much. So far from
22 Bangladesh trying to divert the tribunal from the real issues, as India claims, coastal

¹⁰ BR para 4.33.

1 instability is not only real, it is one of the real issues. Basing any maritime boundary
2 delimitation on places that may soon disappear has to be like building castles on
3 sand. Or to quote Shakespeare's *Tempest*, Act 4, scene 1, "they shall dissolve, and,
4 like this insubstantial pageant faded, leave not a rack behind".¹¹

5 13. The inevitable conclusion is that the degree of coastal instability makes it difficult
6 to locate reliable base points from which to draw a provisional equidistance line. In
7 these circumstances Bangladesh submits that it is more appropriate to use an angle
8 bisector as the basis for the delimitation. A boundary built on that foundation is
9 more likely to last.

10 **II. India's unsuitable base points**

11 14. [GRAPHIC 1] The conclusion that this coastline cannot sustain reliable base points
12 is reinforced if we look a little more closely again at the unsuitable base points
13 selected by India. Professor Akhavan has already shown how implausible these
14 base points are, so I need only reiterate that all of India's base points appear to be
15 underwater. [End Graphic 1].

¹¹ Our revels now are ended. These our actors,

As I foretold you, were all spirits, and
Are melted into air, into thin air:
And like the baseless fabric of this vision,
The cloud-capp'd tow'rs, the gorgeous palaces,
The solemn temples, the great globe itself,
Yea, all which it inherit, shall dissolve,
And, like this insubstantial pageant faded,
Leave not a rack behind.

1 15. Now, India relies on Article 13 of the Convention to justify its choice of base
2 points. And it's true that that article allows base points to be located on LTEs for
3 the purpose of measuring the breadth of the territorial sea provided the elevation is
4 within 12 miles from land. India claims that its base points are on LTEs, and it
5 reiterates this in its letter of 2nd December. But, as Prof Akhavan has already
6 pointed out, it is far from clear that the points chosen by India are indeed on LTEs,
7 rather than underwater. India half recognises the problem in paragraph 6 of its letter
8 of the 2nd of December when it complains that "the timings of the site visit were
9 unfortunately not conducive to viewing the low-tide elevations." Well, perhaps, but
10 it was straightforward factually. We would suggest that India may be misusing the
11 facility provided by Article 13.

12 16. But even if India's base points are located on LTEs, there remain good legal
13 reasons for preferring a different starting point for this delimitation. In the present
14 case we are not measuring the breadth of the territorial sea - we are delimiting a
15 maritime boundary out to and beyond 200 miles. In that context the ICJ has made it
16 clear on several occasions that what it refers to as "minor geographical features"
17 should not be used as the basis for delimiting a maritime boundary. In the *Black Sea*
18 *Case*, for example, the ICJ drew a sharp distinction between, on the one hand, "the
19 issue of determining the baseline for the purpose of measuring the breadth of the
20 continental shelf, or the EEZ, and the issue of identifying base points for drawing
21 an equidistance/median line for the purpose of delimiting the continental shelf.
22 Fundamental distinction there between determining the extent of the shelf or the

1 EEZ and delimiting the shelf and the EEZ¹². In its letter of the 2nd of December,
2 India has no answer to the ICJ's express reluctance to use minor geographical
3 features as the basis for a maritime boundary line.

4 17. So let me, if I may, Mr. President, remind you briefly of the two leading cases, *Gulf*
5 *of Maine Case* and *Qatar/Bahrain*, both of which reinforce the unsuitability of
6 using the kind of LTEs employed by India as base points. In the *Gulf of Maine Case*
7 the Chamber pointed out "the potential disadvantages inherent in any method
8 which takes tiny islands, uninhabited rocks or low-tide elevations, sometimes lying
9 at a considerable distance from terra firma, as base points for the drawing of a line
10 intended to effect an equal division of a given area. If any of these geographical
11 features possess some degree of importance" the Court goes on to say "there is
12 nothing to prevent their subsequently being assigned whatever limited corrective
13 effect may equitably be ascribed to them. But that," the Court says, "is an
14 altogether different operation from making a series of such minor features the very
15 basis for the determination of the dividing line, or from transforming them into a
16 succession of base points for the geometrical construction of the entire line."¹³
17 Now, I would suggest, Mr. President, Members of the Tribunal, that using a
18 succession of minor features to construct the entire line is exactly what India is
19 inviting you to do in the present case.

¹² *Maritime Delimitation in the Black Sea (Romania/Ukraine)* I.C.J Reports 2009, p. 61, para 137.

¹³ *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/USA)*, I.C.J. Reports 1984, p.329, paras 201, 210. See also *North Sea Continental Shelf Cases*, I. C. J. Reports 1969, p. 36, para. 57.

1 18. In the *Qatar/Bahrain Case*, the ICJ also held that “in the present case there is no
2 ground for recognizing the rights of Bahrain to use as a base-line the low-water line
3 of those low-tide elevations which are situated in the zone of overlapping claims, or
4 for recognizing Qatar as having such a right. The Court accordingly concludes that
5 for the purposes of drawing the equidistance line, such low-tide elevations must be
6 disregarded.”¹⁴ Mr. President, members of the tribunal, that paragraph describes
7 perfectly the present case.

8 19. So the logic of these two ICJ cases is that base points for maritime boundary
9 delimitation should be located on something rather more stable and substantial than
10 an LTE or a submerged feature, or that some other method of delimitation should
11 be employed that does not require any use of base points. If that is correct, then
12 India’s choice of LTEs from which to construct an equidistance line is quite
13 inappropriate and the tribunal should not even attempt to rely on such ephemeral
14 phenomena. A fortiori if the Indian base points are in reality not even LTEs but
15 underwater, there is even more reason to be cautious about using them.

16 20. At the very least the tribunal should opt for the most stable base points possible –
17 and those proposed by Bangladesh are in that respect preferable – but the point that
18 Bangladesh seeks to convey is that any choice of base points along this unstable
19 coast will be problematic. So to summarise that part of my argument again: if we
20 look at the law, LTEs are always inappropriate starting points for a boundary

¹⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, I.C.J. Reports 2001, p.102, para 209.

1 delimitation according to the ICJ, and if we look at the facts, the points chosen by
2 India may not even be LTEs – they may, in reality, be underwater even at low tide.

3 21. That’s why in Bangladesh’s view the more appropriate and useful methodology in
4 this situation is the angle bisector used in *Nicaragua/Honduras*,
5 *Guinea/Guinea-Bissau*, and *Gulf of Maine* cases. That method is more in keeping
6 with the geographic reality and is more likely to yield an equitable solution because
7 it also minimises the impact of the concave Bangladeshi coastline.

8 **III. Use of the angle-bisector method by international tribunals**

9 22. I can now turn, Mr. President, Members of the Tribunal, to my second proposition
10 that the case law supports the use of the angle-bisector method in these
11 circumstances. In the *Nicaragua/Honduras* case at paragraph 287, the International
12 Court gave the following explanation for adopting an angle bisector, and they said:
13 “The justification for the application of the angle-bisector method in maritime
14 delimitation lies in the configuration of and relationship between the relevant
15 coastal fronts and the maritime areas to be delimited. In instances where, as in the
16 present case, any base points that could be determined by the Court are inherently
17 unstable, the bisector method may be seen as an approximation of the equidistance
18 method.”¹⁵ The Court went on to observe at paragraph 289 that: “The equidistance
19 method approximates the relationship between two Parties’ relevant coasts by
20 taking account of the relationships between designated pairs of base points. The

¹⁵ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, I.C.J. Reports 2007 (II), p. 741, para 287.

1 bisector method, the Court says, comparably seeks to approximate the relevant
2 coastal relationships, but it does so on the basis of the macro-geography of a
3 coastline as represented by a line drawn between two points on the coasts.”¹⁶

4 23. Mr. President, members of the tribunal. You will have noticed in the excerpts I have
5 just read out that the International Court views the angle-bisector method as “an
6 approximation of the equidistance method.” It’s not suggesting it’s a radical
7 alternative to that method. You may think the Court’s statement is a rather
8 significant contradiction of India’s assumption that strict equidistance is the only
9 possible method. And of course what it tells us is that there may be several ways of
10 achieving equidistance, and India’s method is only one of them.

11 24. There is nothing, I would suggest, in the case law that compels this tribunal to draw
12 a strict equidistance line using selected pairs of base points, even as a starting point.
13 Other methods of delimitation are not forbidden. The angle-bisector method
14 remains the most frequently used alternative. As such it is simply another way of
15 ensuring that the delimitation of a maritime boundary is equitable. Let me quote
16 again from paragraph 287 of the *Nicaragua/Honduras* judgment: “Like
17 equidistance,” the Court said, “the bisector method is a geometrical approach that
18 can be used to give legal effect to the “criterion long held to be as equitable as it is
19 simple, namely that in principle, while having regard to the special circumstances

¹⁶ Para 289.

1 of the case, one should aim at an equal division of areas where the maritime
2 projections of the coasts...converge and overlap”.”¹⁷

3 25. India asserts in its Rejoinder that “it is only when identifying base points is
4 “impossible” – “impossible” - that instability becomes a compelling reason which
5 negates the feasibility of applying the equidistance method.”¹⁸ It reiterates this
6 position in its letter to you of the 2nd of December, where in paragraph 8 it claims
7 that “it is perfectly possible to select base points notwithstanding any instability of
8 the coast.”

9 26. But impossibility is not the test applied in the jurisprudence, and it is plainly wrong
10 to suggest that it is. In the *Nicaragua/Honduras case*, the International Court
11 merely says at paragraph 280: “Given the set of circumstances in the current case, it
12 is impossible for the Court to identify base points and to construct a provisional
13 equidistance line.”¹⁹ “Impossibility” in that sentence is a statement of fact. It’s not
14 a legal requirement. And the impossibility resulted from both coastal instability and
15 from a range of other factors. That reading of the judgment is supported several
16 paragraphs later when the Court says unambiguously: “The use of a bisector — the
17 line formed by bisecting the angle created by the linear approximation of coastlines
18 — has proved to be a viable substitute method in circumstances where equidistance
19 is not possible or appropriate.”²⁰ “*Not possible or appropriate.*” Those are the
20 words they use. Perhaps India didn’t read that paragraph. Clearly the test applied

¹⁷ Para 287, citing from the *Gulf of Maine Case* at para 195

¹⁸ IR para 4.12. See also para 4.24.

¹⁹ Para 280.

²⁰ Para 287.

1 by the Court in *Nicaragua/Honduras* is not impossibility, but impossibility *or*
2 inappropriateness – two rather different standards, either of which will suffice.

3 27. Again, in last year’s judgment in the *Nicaragua/Colombia Case*, the International
4 Court returned to the circumstances when the equidistance method may be
5 disregarded. Not surprisingly the court did not refer to the “impossibility” test
6 relied on by India. Instead it sets out a more nuanced position on equidistance
7 which is directly relevant to our consideration of the angle-bisector method.

8 28. Firstly, at paragraph 194 the International Court notes that the provisional
9 equidistance starting point is not obligatory in every case. They say: “The
10 three-stage process is not, of course, to be applied in a mechanical fashion, and the
11 Court has recognized that it will not be appropriate in every case to begin with a
12 provisional equidistance line.”²¹ Notice again the words “not appropriate” here.
13 Plainly it is legitimate and acceptable not to use a provisional equidistance line
14 when it is “not appropriate” to do so. That is the Court’s test – inappropriateness -
15 not “impossibility”.

16 29. Secondly, after recognizing in the next paragraph that “There is no difficulty
17 constructing a provisional equidistant line from base points on these two coasts”,²²
18 the Court then says “*The question is not whether the construction of such a line is*
19 *feasible* but whether it is appropriate as a starting-point for the delimitation.”²³

20 Again, the Court is clearly saying the real question is not about impossibility or

²¹ Para. 194.

²² Para 195.

²³ Para 195.

1 feasibility but whether it is inappropriate to begin by constructing an equidistance
2 line. And indeed that approach is consistent with the other cases. It was feasible in
3 *Guinea/Guinea-Bissau Case* to construct an equidistance line and it was feasible
4 to do so in the Gulf of Maine case, but in the particular circumstances it was not
5 appropriate to do so. In *Nicaragua/Colombia* it was appropriate to do so and the
6 Court had no need to consider any other method.

7 30. The test of appropriateness was also adopted by ITLOS in *Bangladesh/Myanmar*,
8 where at paragraphs 234 and 235 the Tribunal reiterates that “as an alternative to
9 the equidistance/relevant circumstances method, *where recourse to it has not been*
10 *possible or appropriate*, international courts and tribunals have applied the
11 angle-bisector method, which is in effect an approximation of the equidistance
12 method..... the issue of which method should be followed in drawing the maritime
13 delimitation line should be considered *in the light of the circumstances of each*
14 *case*. The goal of achieving an equitable result must be the paramount
15 consideration guiding the action of the Tribunal.” And they conclude, “therefore
16 the method to be followed should be one that, under the prevailing geographic
17 realities and the particular circumstances of each case, can lead to an equitable
18 result.”²⁴

19 31. That, Mr. President, Members of the Tribunal, surely is the crux of the matter. The
20 appropriate method to be followed is the one that “can lead to an equitable result.”
21 Whether we employ equidistance or the angle-bisector method, the outcome must

²⁴ Paras 234-5.

1 be equitable – as Articles 74 and 83 of the Convention make clear. So your task is
2 not to decide in some abstract way which method is better, or which one is used
3 more often. Your task is quite simply to decide which solution is more equitable,
4 and my task is simply to persuade you that the more equitable solution in the
5 circumstances of this case can be achieved by using the angle-bisector method.

6 32. It is also, I think, equally notable that recent cases have employed several different
7 methods for delimitation, including angle bisector, adjusted equidistance, and
8 equiratio.²⁵ Clearly there is no inherent priority in the choice of method; what
9 matters in all of these cases is quite simply whether the solution conforms with the
10 equitable solution required by other Law of the Sea Convention.

11 33. Bangladesh’s reading of the precedents therefore is that a tribunal may resort to the
12 angle-bisector methodology even when it is possible to identify base points from
13 which to draw an equidistance line. It may do so wherever there are good reasons
14 why it is more appropriate to apply the angle-bisector method in the circumstances
15 of this case. In Bangladesh’s view, those reasons do exist in the present case, and it
16 is appropriate to use angle-bisector methodology. That conclusion is easy to justify
17 if we look again very briefly at the cases.

18 34. It is, of course, obvious that in the *Bangladesh/Myanmar* case the ITLOS formally
19 declined to adopt the angle-bisector method, for reasons set out in paragraph 237
20 and cited earlier. Despite this, as you’re well aware, the line indicated by the
21 tribunal was simply an offset version of the 215° bisector proposed by Bangladesh.

²⁵ *Nicaragua/Honduras, Bangladesh/Myanmar, Nicaragua/Colombia.*

1 To repeat what Bangladesh said in its Reply in the present case: “The only
2 meaningful difference between the boundary proposed by Bangladesh and the
3 boundary as adjudged by ITLOS was that, instead of being drawn from the end of
4 the territorial sea, as Bangladesh had argued, the 215° line was drawn from a point
5 on the provisional equidistance line a short distance off the Bangladesh coast.”²⁶

6 35. So the notable point is that having recognised the need for an equitable adjustment,
7 the tribunal, in effect – if not in name – adopted a modified version of Bangladesh’s
8 angle bisector in order to make that adjustment. The use of a perpendicular of this
9 kind to the general direction of the coast is, of course, a method that also has
10 support in State practice, including, for example, any agreements between
11 Argentina and Uruguay²⁷, Brazil and Uruguay²⁸, Lithuania and Russia (at least in
12 part),²⁹ and Estonia and Latvia³⁰. Although the Argentina/Uruguay boundary
13 formally employs an equidistance line, as Antunes argues in his book, this line is
14 then converted into a perpendicular via the use of a 180° line closing off the mouth
15 of the River Plate³¹. Drawing a perpendicular to the general direction of the coast is
16 indistinguishable from using the angle-bisector method.

17 36. That method was, of course, first used in *Tunisia/Libya*, where the ICJ felt it
18 appropriate to mitigate the effect of small offshore islands.³² That point was more
19 fully explained in the *Gulf of Maine Case* where the angle-bisector method was

²⁶ BR para 4.7.

²⁷ 19 November 1973.

²⁸ 21 July 1972.

²⁹ 24 October 1997.

³⁰ 12 July 1996.

³¹ N. Antunes, *Towards the Conceptualisation of Maritime Delimitation* (2003) 162.

³² *Continental Shelf Case (Tunisia/Libya)*, I.C.J. Reports 1982, p. 18, at para 129.

1 used for one sector of the boundary because of the presence of the many tiny
2 islands, rocks, and low-tide elevations. Sovereignty over at least one of those
3 islands was also in dispute, and the parties had agreed not to use it as a base point.
4 That is true, as India observes,³³ that the parties' agreement to commence the
5 delimitation line seaward of the disputed island "deprived the Court of an
6 equidistance point".³⁴ Nevertheless, there are obvious parallels here with the
7 deltaic coastline of Bangladesh, which is similarly indented and fringed by small
8 islands, LTEs and other insignificant features. The Chamber in *Gulf of Maine*
9 therefore concluded that it should not make use of "such minor features as the very
10 basis for the determination of the dividing line."³⁵

11 37. The Chamber went on to explain at paragraph 210 that if it did rely on these minor
12 features, it said, "the likely end result would be the adoption of a line all of whose
13 base points would be located on a handful of isolated rocks, some very distant from
14 the coast, or on a few low-tide elevations: these are the very type of minor
15 geographical features, they reiterated, which, as the Court and the Chamber have
16 emphasized, should be discounted if it is desired that a delimitation line should
17 result so far as feasible in an equal division of the areas where the maritime
18 projections overlap."³⁶ Now, this is a judgment about the appropriateness or
19 desirability of using minor features as base points on an equidistance line. Nowhere

³³ ICM, para 5.11.

³⁴ *Territorial and Maritime Dispute in the Caribbean Sea (Nicaragua/Honduras)*, I.C.J Reports 2007, p. 743, para 279.

³⁵ Para 201.

³⁶ Para 210.

1 does the Chamber suggest that it was impossible to locate base points. It does not
2 support India's position.

3 38. For those reasons, among others, the Chamber found in that case that it was more
4 appropriate to adopt and opt for the angle-bisector method, than drawing a
5 provisional equidistance line. It explained its reasoning as follows:

6 "... this practical method combines the advantages of
7 simplicity and clarity with that of producing, in the instant case, a result
8 which is probably as close as possible to an equal division of the first area to
9 be delimited. It also believes that, in relation to the sector under
10 consideration, the application of this equitable criterion is not open to any
11 serious objections."³⁷

12 39. Similarly in the *Guinea/Guinea-Bissau Case* the presence of many small coastal
13 islands, an archipelago some 37 miles offshore, and the concavity of the coastline,
14 influenced that tribunal's decision to adopt the angle-bisector method.³⁸
15 **GRAPHIC 2 TAB 1 IN YOUR FOLDER** and hopefully you will see, yes, that
16 map. And you will also find that map at Tab 1 in your folder. After noting that
17 "the equidistance method is just one among many and there is no obligation to use it
18 or give it priority",³⁹ the tribunal concluded: "When.....there are three adjacent
19 states along a concave coastline, the equidistance method has the drawback of
20 resulting in the middle country being enclaved by the other two and thus prevented

³⁷ Para 213.

³⁸ *Delimitation of Maritime Boundary (Guinea/Guinea-Bissau)*, Award of 14 February 1985, paras 95-97, 103.

³⁹ *Ibid*, para 102.

1 from extending its maritime territory as far seaward as international law permits.”⁴⁰

2 Again there is an obvious parallel with the coastline of Bangladesh, fringed with

3 small islands and sandwiched between India and Myanmar. [END GRAPHIC 2]

4 40. Then finally, the most recent case to employ the angle-bisector method is, of
5 course, *Nicaragua/Honduras*. Here both parties accepted that “the sediment[s]
6 carried to and deposited at sea by the River Coco have caused its delta, as well as
7 the coastline to the north and south of the Cape, to exhibit a very active
8 morpho-dynamism.”⁴¹ Nicaragua argued that “the only two points that would
9 dominate any delimitation based on equidistance are the two margins of the River.”
10 They pointed out that “This would remain the same even at a distance of 200
11 nautical miles if only the mainland coast were used.”⁴² The Court itself noted that
12 “continued accretion at the Cape might render any equidistance line so constructed
13 today arbitrary and unreasonable in the near future.”⁴³ It went on to observe:
14 “These geographical and geological difficulties are further exacerbated by the
15 absence of viable base points claimed or accepted by the Parties themselves at Cape
16 Gracias a Dios.”⁴⁴

17 41. So the court concluded in those circumstances that it would be inappropriate to
18 draw a provisional equidistance line. It instead drew, as you’re aware, two straight

⁴⁰ Ibid, para 104.

⁴¹ Para 277.

⁴² Para 84.

⁴³ Para 277.

⁴⁴ Para 278.

1 lines along the respective coastal fronts and then bisected the angle created by those
2 coastal fronts. [GRAPHIC 3]. Hopefully you'll see that again on the graphic.

3 42. Far from the facts of the present case being far removed from those in *Nicaragua v.*
4 *Honduras*, as India has claimed,⁴⁵ the resemblance of that case to the present case
5 is obvious – first, there is the absence of “viable base points claimed or accepted by
6 the Parties themselves”.⁴⁶ Second, we have an unstable coastline making an
7 equidistance line not “appropriate”.⁴⁷ And third, due in this case to the concavity in
8 the Bangladesh coast, the equidistance line becomes all the more inappropriate the
9 further the boundary extends from the coastline – and in the present case. that line
10 would continue, according to India, even beyond 200 M into the outer continental
11 shelf. So I would submit, Mr. President, Members of the Tribunal, these are
12 precisely the circumstances in which an equidistance line risks becoming “arbitrary
13 and unreasonable in the near future”, to reiterate the International Court’s reasoning
14 in *Nicaragua/Honduras*. [END GRAPHIC 3]

15 43. To summarise: these three cases show that the angle-bisector method is more
16 appropriate when there is, first, an indented coast with maritime features too minor
17 to use as base points; secondly, when there’s a concave coast; or thirdly, when
18 there’s an unstable coastline with a very active morpho-dynamism. Uniquely, all
19 three of these elements characterise the relevant coastlines in the present case. It is
20 hard to see a stronger case for employing the angle-bisector method than the

⁴⁵ IR para 4.18.

⁴⁶ Para 278.

⁴⁷ Para 287.

1 present one. That was not true of the *Bangladesh/Myanmar case*, where the only
2 relevant element was the concavity of the Bangladesh coast. Even if, as India
3 suggests, we disregard *Guinea/Guinea-Bissau*, we are still left with two precedents
4 that fairly and squarely point in favour of the angle-bisector method on the present
5 facts. But why should we disregard *Guinea/Guinea-Bissau*? The broader regional
6 perspective which the tribunal adopted in that case is equally relevant in the Bay of
7 Bengal, since this tribunal must also take into account the maritime boundary
8 drawn by the Tribunal in the *Bangladesh/Myanmar*. I will bring you back to
9 *Guinea/ Guinea-Bissau* in a few moments.

10 44. But before I do so, let me draw your attention to a further resemblance between
11 *Nicaragua/Honduras* and the present case. The point is set out in paragraphs 279
12 and 280 of the judgment: “This difficulty in identifying reliable base points is
13 compounded,” the Court says, “by the differences that apparently still
14 remain between the Parties as to the interpretation and application of the King of
15 Spain’s 1906 Arbitral Award in respect of sovereignty over the islets formed near
16 the mouth of the River Coco and the establishment of “[t]he extreme common
17 boundary point on the coast of the Atlantic”.⁴⁸ The Court went on then to explain
18 that “because of the changing conditions of the area the Court has made no finding
19 as to sovereignty over those islands Moreover,” they go on to say, “whatever
20 base points would be used for the drawing of an equidistance line, the configuration
21 and unstable nature of the relevant coasts, including the disputed islands formed in
22 the mouth of the River Coco, would make these base points (whether at Cape

⁴⁸ I.C.J Reports 2007, p.659, at para. 279.

1 Gracias a Dios or elsewhere) uncertain within a short period of time.”⁴⁹ “uncertain
2 within a short period of time.” And it was for those reasons the Court in that case
3 found it necessary and inappropriate to depart from the equidistance formula set out
4 in Article 15 of Law of the Sea Convention.

5 45. In the present case the parties are still in dispute over the location of the land
6 boundary terminus, over the correct interpretation of the Radcliffe Award and the
7 subsequent arbitral decisions relating to it. They are also in dispute over the
8 existence and status of South Talpatty and whether either party has sovereignty
9 over it or indeed whether there was anything to have sovereignty over. The
10 problems which confronted the International Court in *Nicaragua/Honduras* are, we
11 would submit, no less severe in the present dispute. That is yet another reason to
12 prefer angle-bisector methodology over equidistance methodology whose use will
13 inevitably take the tribunal into disputed matters of sovereignty over territory.

14 46. Bangladesh would therefore submit that this tribunal should likewise and for the
15 same reasons depart from Article 15 and apply an angle-bisector approach
16 throughout the territorial sea and beyond that in the 200 miles EEZ.

17 47. So we can now, I think, draw some conclusions as to why the angle-bisector
18 method of delimitation produces a more equitable solution in those cases where it
19 has been employed. Four points, I would suggest, stand out:

⁴⁹ Para 280.

1 First, the angle-bisector method produces a more effective reflection of the
2 coastal relationships;

3 Secondly, it produces a result which constitutes a better expression of the
4 principle of equal division of the areas in dispute;

5 Thirdly, it is more consistent with the principle of non-encroachment;

6 And finally, it prevents, as far as possible, any cut-off of the seaward projection of
7 the coast of either of the States concerned.

8

9 **IV. The angle bi-sector method in the present case**

10 48. Mr. President, members of the Tribunal, let me now take you finally to my third
11 submission, Bangladesh's application of the angle-bisector method is more
12 appropriate to the circumstances of the present case. As you will be aware, using
13 the angle bisector involves two steps: first, straight lines are drawn along the
14 general direction of the relevant coasts, and secondly, the angle formed by the
15 intersection of these straight lines is then bisected. The direction of that line
16 becomes the direction of the boundary.⁵⁰

17 49. You will see on screen now how the angle bisector has been constructed and
18 applied in this case [GRAPHIC 4 – TAB 2 IN YOUR FOLDER]. You will also
19 find that map at Tab 2 in your folder. First, we draw a single straight line across
20 the delta coast, from the Indian side to the Bangladesh side. Why this line rather
21 than any other? The decisive points are that it reflects the east-west direction of
22 most of the Bengal Delta's coastal façade, and that it covers the unstable delta
23 coastline but not much more than that. That is why the longer section of the line is
24 on the Bangladesh side. [END GRAPHIC 4]

⁵⁰ BM para 6.87.

1 50. You will then see how this choice of line compares to the one used in
2 *Guinea/Guinea-Bissau*. Here is the illustration [GRAPHIC 5 – TAB 3 IN YOUR
3 FOLDER]. Notice the similarly indented and far-from-regular West African
4 coastline. In both examples the straight line drawn across the coastal façade runs
5 partly out to sea and partly over land. Bangladesh’s proposed straight line across
6 the delta is, as you can see from the comparison, far from exceptional or
7 unprecedented. Indeed the *Guinea/Guinea-Bissau* case is obviously the strongest
8 precedent for what Bangladesh proposes. [END GRAPHIC 5]

9 51. [GRAPHIC 6 – Second, we have then – I think you will see the next graphic coming
10 up - drawn a 180° bisector TAB 4 IN YOUR FOLDER which extends southwards
11 in a line perpendicular to the straight line drawn across the coastal façade. [END
12 GRAPHIC 6] In effect that bisector follows a line perpendicular to the general
13 direction of the most relevant coastline – as it also did in *Guinea/Guinea-Bissau*.
14 [GRAPHIC 7] You can see on the screen now how this 180° bisector very
15 accurately divides the concavity and balances the overall geography of the Bay of
16 Bengal. TAB 5 IN YOUR FOLDER Again, the similarity to
17 *Guinea/Guinea-Bissau* lies in the regional geography and the obvious need to
18 ensure a solution which reflects that geography. But there is another good reason
19 for choosing the 180° bisector – it reflects the consistent practice of Bangladesh
20 over many years – since the adoption of the Territorial Waters and Maritime Zones
21 Act in 1974. Bangladesh has exercised jurisdiction up to the 180° line out to 200
22 miles since then. [END GRAPHIC 7]

1 52. Third, within 200 miles zone the 180° line would give Bangladesh some relief from
2 the cutoff effect on both sides of the concavity of the Bay. GRAPHIC 8 – The next
3 illustration TAB 6 IN YOUR FOLDER , this illustration reflects that point. Now,
4 you'll see there extending southwest from Bangladesh there's a blue funnel which
5 indicates Bangladesh's access to the continental shelf beyond 200 miles. On
6 either side you will see a yellow wedge of continental shelf out to 200 miles. The
7 wedge to the east is bounded by the ITLOS line drawn in the *Bangladesh/Myanmar*
8 *case*. The one to the west is bounded by the 180° bisector proposed by Bangladesh.
9 The obvious and critical point is that the wedge on the Myanmar side covers an area
10 of 25,654 sq. kms, while the wedge on the Indian side covers an area of 25,069 sq.
11 kms – very close to an equal division on both sides. The 180° bisector would,
12 therefore, enable this tribunal to give Bangladesh almost the same relief from the
13 effects of concavity as the ITLOS did in the *Myanmar case*. Now, it's true that an
14 equitable solution is not necessarily synonymous with equality of treatment. But a
15 method of delimitation which comparably abates the effects of concavity on both
16 sides is more likely to be equitable to all parties, and the 180° bisector goes part of
17 the way towards that result. Adopting it would decisively reject the “Myanmar
18 pays” theory of maritime boundary delimitation adhered to by India throughout the
19 pleadings. Both India and Myanmar would then contribute to making the
20 adjustment necessary to ensure an equitable solution.[END GRAPHIC 8]

21 53. Fourth, and finally, the 180° bisector also minimises but does not wholly eliminate
22 the inequitable impact of the double concavity in which Bangladesh sits.
23 [GRAPHIC 9] - If you look at the next illustration, you should again see what I

1 mean. The ITLOS line on the right on the eastern side of the triangle and
2 Bangladesh's 180° bisector is shown on the western side. If that line were simply
3 extended beyond 200 miles it will quickly meet the ITLOS line and Bangladesh's
4 Professor Reichler – I'm sorry, as Mr. Reichler pointed out yesterday. I've
5 promoted him again. I'm following your example, Mr. President – if that line
6 were simply extended beyond 200 miles, it will quickly meet the ITLOS line and
7 Bangladesh would still be cut off by the enduring effects of the concavity of its
8 coast. Professor Crawford will address you on how to solve that problem. [END
9 GRAPHIC 9] All I need say at this stage is that the angle-bisector method does not
10 have to be used exclusively for all elements of the boundary. The solution overall
11 has to be equitable, and an equitable solution can be achieved by using several
12 different techniques at different points. You're already familiar with the point that
13 that was exactly what happened in the *Gulf of Maine* and the *Nicaragua/Colombia*
14 cases. If it was appropriate to use different methods in those cases in the relatively
15 confined geography of the Eastern Caribbean or the Gulf of Maine, there is no
16 reason why it should not also be appropriate to do so in the relatively confined
17 geography of the Northern Bay of Bengal.

18 54. Bangladesh therefore submits that using the 180° bisector solution is as far as
19 possible equitable out to 200 miles for the six reasons set out in Chapter 6 of this
20 Memorial.⁵¹

21 a. First, it respects the geographic unity of the Bengal Delta.

⁵¹ Paras 6.110 – 6.115.

1 b. Secondly, it respects the geographic relationship between both Parties in the
2 Bengal Delta.

3 c. Thirdly, it's consistent with the macro-geography of the south-facing
4 orientation of the Northern Bay of Bengal.

5 d. Fourthly, it accurately depicts the general direction of the coast.

6 e. Fifthly, it abates the cut-off of Bangladesh's maritime projection, while
7 having little effect on India's.

8 f. Finally, it gives Bangladesh access to the continental shelf beyond 200
9 miles.

10 55. Mr. President, Members of the Tribunal, you will find all of that summarized at
11 paragraphs 6.110 to 6.115 of the Memorial. We could look at the outcome another
12 way in order to confirm the same result. India will no doubt say that if the Tribunal
13 is to use a bisector it should use another one – perhaps this one – which shifts the
14 bisector eastwards. [GRAPHIC 10] Now, the Tribunal might indeed consider
15 drawing a bisector this way, but I have no doubt you will quickly reject the idea for
16 exactly the same reason that you will reject an equidistance line - because neither
17 would produce the equitable solution required by Articles 74 and 83 of the
18 Convention. A more easterly bisector would not compensate for the concavity of
19 Bangladesh's coastline at all. The further east you swing the bisector the more you
20 again cut off Bangladesh and exacerbate the concavity rather than compensating
21 for it. [END GRAPHIC 10]

22 56. For the same reasons, Bangladesh has not sought to push the bisector any further
23 west than 180°, because obviously to do so would begin to cut India off from

1 achieving its maximum reach. The 180° bisector was adopted in 1974 precisely for
2 the reason that – contrary to what India claims in the Rejoinder⁵² - it does not cut
3 India off, but it does partially compensate Bangladesh for the effects of concavity
4 within 200 miles. That line is in fact less favourable to Bangladesh than the 215°
5 line adopted by the ITLOS in *Bangladesh/Myanmar*. The ITLOS line does not cut
6 off Myanmar, and it also does not cut off Bangladesh.

7 57. Finally, I would submit, that the equitableness of the 180° bisector is confirmed by
8 the disproportionality test, but I will leave it to my colleague Mr. Martin to develop
9 that argument later this morning. In short, I would submit the 180° line is fully
10 consistent with the rules of delimitation referred to in Articles 74 and 83.

11 **V. Conclusion**

12 58. Mr. President, members of the tribunal, that brings me happily to my conclusions,
13 which are very brief. You have in this case, I would suggest, the clearest possible
14 illustration of why the provisional equidistance line is not an appropriate starting
15 point in every maritime boundary dispute or in this case. Stability should be a
16 fundamental feature of any boundary delimitation, whether at sea or on land.
17 Boundaries don't often disappear through natural causes, but if you choose to base
18 this one on an equidistance line drawn from the base points proposed by India – or
19 even those proposed by Bangladesh – you do run the risk of being remembered by
20 future generations of UNCLOS practitioners as the men who built their house on
21 shifting sands. It does not require the evidence of a clairvoyant to see how likely it

⁵² IR, para 6.20.

1 is that in twenty or thirty years or less, the coastal geography may have changed
2 utterly. Why take that risk when a simple, practical, and equitable solution is at
3 hand? The angle bisector proposed by Bangladesh will do the job more effectively
4 and more equitably, as, we hope, even India will recognise. We commend it to the
5 Tribunal.

6 59. Mr. President, I would now ask you to give the floor to Professor Crawford.

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1 PRESIDENT WOLFRUM: Thank you, Professor Boyle, for your
2 statement. And I would like now, as you request, to give the floor to Professor Crawford.

3 Professor Crawford, are you going to speak for more than 20 minutes, or what
4 is your intention?

5 PROFESSOR CRAWFORD: My intention is to speak for about an hour, but
6 I would allow you some coffee in the middle as compensation.

7 PRESIDENT WOLFRUM: Okay. You indicate when you find the
8 appropriate moment to break.

9 PROFESSOR CRAWFORD: I will do so.

10 PRESIDENT WOLFRUM: Thank you, Mr. Crawford.

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1 **PERMANENT COURT OF ARBITRATION**

2
3 *Bay of Bengal Maritime Boundary*

4 *Arbitration between Bangladesh and India*

5
6 **James Crawford AC SC**

7
8 **The Delimitation of the Outer Continental Shelf**

9
10 10 December 2013

11
12 **VI. Introduction**

13 Mr. President, Members of the Tribunal, it is an honour to appear before you on behalf of
14 Bangladesh.

15 1. It is my task to explain Bangladesh's case on continental shelf delimitation beyond
16 200 miles as set out in the Reply, and to deal with India's criticisms of it in the
17 Rejoinder.

18 2. In fact India spends very little time on the issue of continental shelf delimitation
19 beyond 200 miles, largely contenting itself with the assertion that Bangladesh's
20 claim is "purely arbitrary and lacks legal basis". This is by no means true, as I will
21 show.

22 3. This presentation is, in classical Cartesian mode, in two parts. First, I will
23 examine India's outer continental shelf claim line and show that it is neither

1 equitable nor legally defensible. I will also show that none of the suggested
2 alternatives to India's line within 200 miles, if continued in a linear fashion, would
3 address the inequitable situation created by virtue of Bangladesh's position on a
4 concave coast caught between India and Myanmar. This is not even true of the
5 angle bisector. Secondly and accordingly, I will go back to basics, setting out and
6 justifying Bangladesh's outer continental shelf claim line, a geodesic parallel to the
7 line of the ITLOS judgment. I will respond also to India's criticisms of that line.
8 My colleague Mr. Martin will then return and show that India's claim line is not
9 disproportionate in terms of the third-stage test for disproportionality.

10 a. India's OCS Claim does not achieve an equitable solution

11 4. First, then, I turn to analyse India's outer continental shelf claim beyond 200 miles
12 as it stands, in all its brutal simplicity. I take the claim as shown in **RJ 7.1**, taken
13 from its Rejoinder (**Tab 3.7** in your Folders). A mere glance shows the evident
14 lack of balance. True, Bangladesh has a tiny slice of outer continental shelf; in
15 area it amounts to 1300 square kilometres. But it is transparently at the expense of
16 Myanmar, not India. The slice is well to the east of the meridian drawn from the
17 land boundary terminus, and it stops no more than 88 km beyond the EEZ, leaving
18 Bangladesh shelf-locked beyond that point. In fact the area 'conceded' by India –
19 the small triangle east of the line Y-T7 – has never at any time been claimed by
20 India, whether against Bangladesh or against Myanmar. It lies to the east of the
21 original median line between India and Myanmar as claimed by India.

1 5. The Tribunal can form a better impression of India’s outer continental shelf claim if
2 we compare the areas of overlapping potential entitlement based on the frontages of
3 the parties on the 200-mile line with the amounts of maritime zone actually
4 generated by them, according to India. To see this we have to look at a somewhat
5 wider area than that shown in Figure RJ 7.1.

6 [END GRAPHIC]

7 [FIGURE 2]

8 6. **We move to Tab 3.8.** This shows the simplified coastal frontages of the three
9 Bay of Bengal states: the relevant coastlines are 708 km of India’s south and
10 south-eastward facing coast (down to Sandy Point); 424 km for Bangladesh and
11 587 km for Myanmar (down to Cape Negrais). These are all substantial coastlines.

12 7. The Figure also shows the outer continental shelf frontages of the three States, by
13 that I mean their frontages on the 200-mile line from their respective relevant
14 coasts. According to India’s “equitable” solution, these frontages are
15 respectively:

16 India (east-facing frontage): 500 km

17 Bangladesh: 36 km

18 Myanmar: 259 km

19

20 [GRAPHIC -- AREA OF CLCS SUBMISSIONS]

21

1 8. **Tab 3.9** shows the area of maximum potential OCS entitlements of those 3 States
2 as claimed to the CLCS -- I will deal only with overlapping claims limited by
3 Bangladesh's constraint lines under Article 76. These claims obviously overlap to
4 a significant extent. The practice before the CLCS has been to claim very large
5 areas without regard to delimitation, and subject only to the inherent constraints of
6 Article 76 including its without prejudice clause subparagraph (10). These areas
7 in the present case are as follows:

8 India: 73,500 km²

9 Bangladesh: 95,700 km²

10 Myanmar: 95,300 km²

11

12 [END GRAPHIC]

13 [AREAS AFTER INDIA'S DELIMITATION]

14

15 9. More relevant perhaps, and certainly revealing, is the area of OCS which India's
16 delimitation actually allocates to the three States: this is **Tab 3.10**. In order to
17 calculate this it is necessary to extend the Myanmar/India delimitation in the east
18 (i.e. the delimitation between Myanmar and the Andaman Islands) out until it meets
19 the ITLOS line. This continuation is something which India says the law
20 unthinkingly requires, so we have unthinkingly done it. The resulting areas are as
21 follows:

1 India: 77,000 km²

2 Bangladesh: 1,300 km²

3 Myanmar: 17,726 km²

4 [END GRAPHIC]

5 [SHOW TABLE]

6 **Table 1**

	India	Bangladesh	Myanmar
Coastal frontage (km)	708	424	587 (to Cape Negrais)
OCS frontage after India's delimitation (km)	500	36	259
Area of OCS submitted to CLCS (km ²)	73,500	95,600	95,300
Actual area of OCS after India's claims (km ²)	77,000	1,300	17,700
Coastal frontage : OCS frontage (percentage)	71%	8.5%	44%
OCS frontage: Actual OCS after India's claims (km ²) (ratio)	1 : 254	1: 36	1: 68
Actual OCS after India's claims (km ²)/Area of OCS submitted to CLCS (km ²) (percentage)	104.8%	1.35%	18.6%

7

8 10. We put all that together in a table, which sets out the relevant ratios. It shows what

9 may be called the contrast between generative potential and actual outcome. This

1 can be expressed in potential terms, and these are shown in **Tab 3.10** of your
2 folders. The first relationship is that between the simplified coastal frontage and
3 the simplified OCS frontage. You will see that India's coastal frontage generates a
4 substantial corresponding OCS frontage (actually 71%). No sign of squeezing
5 there! By contrast, Bangladesh's significant coastal frontage, in excess of 400 km,
6 generates only 36 km in length. That's 8.5% of its actual coastal frontage. And
7 because of the concavity, that coastal frontage generates a tiny continental shelf
8 beyond 200 miles. According to India's theory of the case, Bangladesh gets 1.35%
9 of its maximum potential entitlement. India's equitable solution reminds me of a
10 child allowed the first cut of a birthday cake: "I'll take everything and you can have
11 what's left."

12 11. India's self-proclaimed domination of the area can be illustrated in other ways,
13 perhaps none is clearer than the relative proportion of continental shelf which both
14 acquire under India's delimitation as compared with the amounts of their respective
15 OCS claims. Again the figures are dramatic. India achieves the remarkable feat
16 of getting more outer continental shelf than it initially sought in the area of overlap:
17 104.8%. I never got 104.8 percent at university. Perhaps I didn't try hard
18 enough. The reason for the overkill -- I mean discrepancy -- is the extra
19 quadrilateral India now claims. At the other end of the spectrum, Bangladesh gets
20 1.35% of the OCS claim according to India's delimitation -- 1.35%. I never got
21 that at university either, I'm pleased to say. Myanmar's shelf which India would
22 allow amounts to 18.5% of its OCS claim.

1 12. I pause to note that Myanmar is in something of an intermediate position. Its
2 simplified coastal frontage is 587 km, as determined by ITLOS. It's constrained
3 by the Andaman Islands of which it has a maritime delimitation agreement out to
4 200 miles.⁵³ Thus the west-facing coastal frontage of Myanmar is somewhat
5 cut-off: 587 km produces a frontage of 259 km on the outer continental shelf which
6 is 44%. But even with that constraint, an unfavourable equidistance boundary
7 with India, vis-à-vis the Andamans, Myanmar's west-facing coast still generates a
8 200-mile frontage to an extent considerably more favourable than in the case with
9 Bangladesh under India's strict – and I call it vegetarian -- diet of equidistance.

10 13. To summarize, twenty kilometres of Bangladesh's coastal frontage generates less
11 than 2 km on the outer continental frontage on the 200-mile line, and each
12 kilometre on that 200-mile line generates only around 36 km² of outer continental
13 shelf, if India is right on this delimitation. By contrast, twenty kilometres of
14 India's relevant coast is represented by more than 14 kilometres on the 200-mile
15 line, which in turn generates on the order of 5,500 km² of outer continental shelf.
16 India's coastal frontage is nearly 150 times more powerful than Bangladesh's,
17 when it comes to outer continental shelf. India emerges out of the EEZ like
18 Superman out of a phone booth.

19 [END GRAPHIC]
20

⁵³ Agreement between the Socialist Republic of the Union of Burma (Myanmar) and the Republic of India on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal of 23 December 1986 (entered into force on 14 September 1987), 27 ILM 1144 (1988).

1 Mr. President, Members of the Tribunal:

2 14. Faced with this inescapable reality, India's position can only be described as
3 imperious, if not imperial, and this in several respects. First, it holds that it is
4 sufficient that the Myanmar-Bangladesh maritime boundary has been adjusted
5 away from equidistance; nothing more is required. This can be described, in
6 Kiplingesque terms, as the Burmese burden – I won't attempt to reduce it to verse,⁵⁴
7 but it is India's repeated refrain. It is expedient that one country should suffer for
8 the sake of an equitable solution, just so long as that country is not India.

9 [NEW GRAPHIC -- TAB 3.12]

10

11 15. Secondly, as I have already noted, vis-à-vis Bangladesh, India claims more by way
12 of outer continental shelf than it did *as against the world* in its initial submission to
13 the CLCS. You can see this from **Tab 3.12**. India's outer continental shelf claim
14 to the CLCS is shown in pink. The area between the provisional equidistance line
15 and the eastern limit of India's initial claim was not initially conceived by India as
16 part of its entitlement. I call it the quadrilateral. It's the quadrilateral area in blue.
17 India describes this argument as 'curious' and explains that it was a function of the
18 presumption of equidistance which it had adopted in articulating its outer
19 continental shelf claim.⁵⁵ It is nonetheless of some significance that India simply
20 assumes it is entitled to anything in the area of overlapping claims that may become
21 available -- like the child with the cake. Even though, in terms of its vast

⁵⁴ See <http://www.fordham.edu/halsall/mod/kipling.asp>.

⁵⁵ IR, para 7.26.

1 entitlement to the south, the area is tiny. It counts for India as an ‘unconsidered
2 trifle’, it is perfectly prepared to snap it up at Bangladesh’s expense.⁵⁶ The area in
3 question, the quadrilateral, is 3500 km². It represents an addition of some about
4 1% of India’s claim to outer continental shelf north of 10°N. It is actually larger
5 than the area of outer continental shelf India leaves, however reluctantly, to
6 Bangladesh: on India’s calculation, that is 1300 km²: perhaps we should call it a
7 ‘considered trifle’, it’s an even lesser trifle India considers Bangladesh can have.
8 India’s additional claim to the quadrilateral is 3 times the amount it leaves to
9 Bangladesh, which it never even claimed.

10 [END GRAPHIC]

11 [BACK TO GRAPHIC 1]

12
13 16. India gives several reasons for attributing this trifling area, and only this trifling
14 area, to Bangladesh. First, it relies on equidistance as the norm in virtually all
15 cases. Secondly, it says that the law requires that the line delimiting the
16 continental shelf within 200 miles should continue to do so beyond 200 miles,
17 relying on a passage from the *Bangladesh/Myanmar judgement*. And thirdly, it
18 argues that the equidistance boundary beyond 200 miles achieves an equitable
19 solution. Let me deal with these points in turn.

⁵⁶ Cf Shakespeare, *Winter’s Tale*, Act IV sc 3, l. 23

1 17. First, India relies on a strong -- one might almost say irrefutable -- presumption of
2 equidistance.⁵⁷ Equidistance rules OK, says India, even though equidistance has
3 never been a rule and even though almost all India's equidistance base points are, to
4 put it kindly, evanescent, if not to say submerged. My colleagues have already
5 dealt with that argument.

6 18. India's second argument is, or appears to be, that the law requires the continuation
7 of the line drawn within 200 miles beyond that limit no matter what. In this
8 respect it relies heavily on the following passage from the *Bangladesh/Myanmar*
9 judgment:

10 "the delimitation method to be employed in the present case
11 for the continental shelf beyond 200 miles should not differ from that within
12 200 miles. Accordingly, the equidistance/relevant circumstances method
13 continues to apply for the delimitation of the continental shelf beyond 200
14 miles."⁵⁸

15
16 19. But it is necessary to consider that passage in its context, and against the
17 background of the arguments actually made by the parties. The Tribunal began its
18 analysis by observing, correctly of course:

19 "Article 83 of the Convention addresses the delimitation of
20 the continental shelf within States with opposite or adjacent coasts without
21 any limitation as to area. It contains no reference to the limits set forth in

⁵⁷ See e.g. IR, para. 7.1.

⁵⁸ ITLOS Reports 2012, para 455 cited in ICM, para 7.49 and IR, para 7.4.

1 article 76, paragraph 1, of the Convention. Article 83 applies equally to the
2 delimitation of the continental shelf both within and beyond 200 miles.”⁵⁹

3 There follows the passage quoted above. The Tribunal went on to say:

4 “... the equidistance/relevant circumstances method ... is
5 rooted in the recognition that sovereignty over the land territory is the basis
6 for the sovereign rights and jurisdiction of the coastal State with respect to
7 both the exclusive economic zone and the continental shelf. This should be
8 distinguished from the question of the object and extent of those rights, be it
9 the nature of the areas to which those rights apply or the maximum seaward
10 limits specified in articles 57 and 76 of the Convention. The Tribunal notes
11 in this respect that this method *can, and does in this case*, permit resolution
12 also beyond 200 miles of the problem of the cutoff effect that can be created
13 by an equidistance line where the coast of one party is markedly concave.”⁶⁰

14
15 20. I emphasise the words “*can, and does in this case*”. This is an expression of
16 contingency, not necessity; of appraisal and appreciation, not of law. After all,
17 Myanmar was cut off as well as Bangladesh, as I have shown, although not as
18 severely. The Tribunal was not saying that in every conceivable case the
19 delimitation line which was appropriate and called for by relevant circumstances
20 within 200 miles must necessarily be the same line as that appropriate beyond 200
21 miles. It was saying that the equidistance/relevant circumstances method, not
22 itself a rule, was capable of producing, and did in fact produce, an equitable result if
23 prolonged to the outer limit “in this case”, as between Bangladesh and Myanmar.

⁵⁹ ITLOS Reports 2012, para 454.

⁶⁰ *Ibid.*, para 455 (emphasis added).

1 And the Tribunal went on to say that it would “accordingly proceed to re-examine
2 the question of relevant circumstances *in this particular context*”.⁶¹

3 21. In fact in that case Myanmar made no submissions as to outer continental shelf
4 delimitation, whereas the gist of Bangladesh’s argument was that it “would be
5 entitled to a greater portion of the disputed area because it has ‘the most natural
6 prolongation’”.⁶² That amounted to saying that my shelf is more inherent than
7 yours. The Tribunal categorically rejected that argument, and it is **not** now part of
8 Bangladesh’s submission before you. Instead the Tribunal held that:

9 “Having considered the concavity of the Bangladesh coast to
10 be a relevant circumstance for the purpose of delimiting the exclusive
11 economic zone and the continental shelf within 200 miles, the Tribunal
12 finds that this relevant circumstance has a continuing effect beyond 200
13 miles.”⁶³

14 That was a temporally and logically distinct part of the Tribunal’s decision, even if
15 (Bangladesh’s principal argument to the contrary having been rejected) it was neither
16 difficult nor controversial. But that will not always be the case. Geographical factors
17 may play a differential role in relation to different segments of the area to be delimited, and
18 it is common for delimitations especially of a single maritime boundary to stop at 200 miles
19 but with the promise (or at least the possibility) of more to come in relation to the outer
20 continental shelf. That happened in both *Nicaragua/Honduras*⁶⁴ and in

⁶¹ Ibid., para 455 (emphasis added).

⁶² Ibid., para 460.

⁶³ Ibid., para 461.

⁶⁴ *Nicaragua v. Honduras*, para. 319.

1 | *Nicaragua/Colombia*.⁶⁵ Stopping at the 200 mile limit was convenient in those cases, in
2 | part because of potential impacts on third States; but it left unresolved questions both of
3 | entitlement and delimitation.

4 | Mr. President, that would be a convenient moment for coffee.

5 | [END GRAPHIC]

6 | [SHOW NIC/COL LINES: TAB 3.13]

7 | Thank you, sir.

8 | Mr. President, Members of the Tribunal, before the break I was
9 | talking about the significance of the 200-mile line in delimitation.

10 | 22. In this context I should say a word about *Nicaragua/Colombia*, to which Mr.
11 | Reichler has already referred. The Court's decision is portrayed in **Tab 3.13**. It
12 | was a unanimous and which shows the priority of equity over equidistance; it also
13 | shows how a range of different techniques can be adopted and taken together in the
14 | quest for an equitable solution. The Court substantially qualified the equidistance
15 | line in the west and abandoned it entirely in the north and the south. It enclaved or
16 | semi-enclaved various small features. But at the same time it refused Nicaragua's
17 | claim to enclave the main islands, small though they are; it credited their
18 | eastward-facing coasts and established a corridor the width of the main islands.

⁶⁵ *Nicaragua v. Colombia*, para. 251.

1 Moreover it stopped Nicaragua’s maritime zones at 200 miles, leaving their
2 delimitation for another day.⁶⁶

3 [END GRAPHIC]

4

5 23. Now, I suppose I should not testify about anything, let alone a case in which I was
6 counsel. But I can say, I think, that no one involved in the maritime delimitation
7 aspects of that case predicted or could have predicted the outcome with precision,
8 or even approximately. In no respect did it follow equidistance: the *equiratio*
9 formula is a marked modification of equidistance – but why not 40% or 20% as
10 compared with 25%. It was all a question of appreciation, a point to which I will
11 return.

12 24. In short, maritime delimitation lines can change direction in response to relevant
13 circumstances and the orientation of a line at or beyond 200 miles is not automatic.
14 It requires case-by-case evaluation, and in the jurisprudence it has received separate
15 consideration. Extant agreements and treaties beyond 200 miles, of which there
16 were at least a dozen before the ITLOS judgment, have employed a variety of
17 methods, reflecting the need to assess all relevant circumstances. India evidently
18 believes in predestination, cartographically speaking, but if that were right, the
19 process of “re-examin[ing] the question of relevant circumstances in this particular

⁶⁶ *Nicaragua v. Colombia*, para. 251.

1 context”,⁶⁷ a quote from Vienna, beyond 200 miles, would be vacuous or trivial.
2 It is neither.

3 [BACK TO GRAPHIC 1]

4

5 25. India’s third argument to support its outer continental shelf claim vis-à-vis the
6 overall effect is equitable or at least not inequitable.⁶⁸ It doesn’t defend the
7 Bangladesh sliver – the little bit of cake that is left. It takes refuge in the nostrum
8 that there is a single continental shelf. In fact its argument on this point is exiguous
9 in the extreme: it simply asserts that there “are no relevant circumstances in the
10 present case and, therefore, no reason to shift or adjust the provisional equidistance
11 line beyond 200 miles.”

12 [END GRAPHIC]

13 [ITLOS GRAPHIC 8 (p 144) SHOWING RELEVANT AREA: TAB 3.14]

14

15 26. Well, ITLOS comprehensively disagreed with this assertion that there were no
16 relevant circumstances. I recall its depiction of the relevant area, now on the
17 screen and at **Tab 3.14**. India’s version of the equidistance line does not even
18 leave to Bangladesh the minimum area of 283,471 km² that ITLOS indicatively
19 attributed to it.⁶⁹ India’s claim gives it 28,200 km² less than is shown in that
20 figure. It not only cuts across Bangladesh’s coastal frontage: it cuts across all

⁶⁷ *Bangladesh/Myanmar*, para 456 (emphasis added).

⁶⁸ IR, para. 8.7.

⁶⁹ *Bangladesh/Myanmar*, Figure 8, p. 144.

1 reasonable expectations held by the people of Bangladesh (and by impartial
2 observers) as to the overall outcome of this litigation.

3 [END GRAPHIC]

4 [SHOW GRAPHIC 1]

5

6 27. Nor, unlike Bangladesh, does India offer any alternative to its equidistance line
7 within or beyond 200 miles. Should your Tribunal perchance disagree with India
8 that all is the best in the best of all possible equidistance worlds, you will get no
9 help from India as to what to do about it. Perhaps that will change this week; we
10 will see.

11 28. Meanwhile my colleagues have demonstrated conclusively that India's version of
12 the equidistance line within 200 miles is inequitable, and if that is true, it is true *a*
13 *fortiori* beyond that limit. Two wrongs don't make a right; two inequities
14 combined don't achieve an equitable solution. The truth is that none of India's
15 arguments for its proposed delimitation beyond 200 miles can withstand
16 examination.

17 [END GRAPHIC 1]

18 [SHOW PR GRAPHIC: ROTATING THE PROVISIONAL EQUIDISTANCE LINE
19 TAB 3.15]

20

21 Mr. President, Members of the Tribunal:

1 29. What I have said about India's claim line applies -- unfortunately -- also to the
2 potential solutions to the delimitation problem within 200 miles, including
3 Bangladesh's own solution, the angle bisector. I refer to **Tab 3.15**). Within 200
4 miles the delimitation should not unreasonably cut off either India's or
5 Bangladesh's coast; we have shown that a 180° line, whether produced by an angle
6 bisector or an adjusted equidistance line, does not do so. But the fact is that neither
7 of these solutions achieves an overall equitable solution if one simply extends those
8 lines beyond 200 miles, as India proposes *de lege*. The problem produced by the
9 concavity is exacerbated as we proceed seaward. The overall effect is inequitable
10 and clearly so. The point was made by the Court in the *North Sea* case: "in the
11 case of concave or convex coastlines ... if the equidistance method is employed,
12 the greater the irregularity and the further from the coastline the area to be
13 delimited, the more unreasonable are the results produced."⁷⁰

14 [END GRAPHIC]

15 [R4.24 SHOWING ANGLE BISECTOR EXTENDED DOWN TO ITLOS LINE: TAB
16 3.16]

17
18 30. Appropriate and equitable as the angle bisector may be within 200 miles, by the
19 time it reaches the 200-mile line, it allows only a comparatively narrow frontage for
20 Bangladesh on the outer continental shelf--better than the 36 km that India
21 proposes, but still exhibiting the distorting effect of the concavity. You can see
22 from **Tab 3.16** the tapering wedge of maritime space which even that solution

⁷⁰ ICJ Reports 1969 para 89.

1 produces. If the 180° bisector line is simply extended, it still meets the Myanmar
2 boundary in a tapering wedge.

3 [END GRAPHIC]

4 [OCS AFTER ANGLE BISECTOR EXTENDED TO ITLOS LINE: TAB 3.17]

5

6 31. The area of outer continental shelf thereby allocated to Bangladesh is 12,000 km²,
7 again an improvement on the 1300 km² which a 36 km coastal frontage affords, but
8 still a serious constraint and a serious inequity. The resulting areas are as follows:

9 India: 66,700 km²

10 Bangladesh: 12,000 km²

11 Myanmar: 17,726 km²

12

13 32. You have also heard from Mr. Reichler about alternatives to the angle bisector.
14 An adjusted equidistance line offers some relief within 200 miles but decreasingly
15 as the line moves south. In order to achieve an equitable solution overall, then we
16 have to think again about delimitation beyond 200 miles.

17 [END GRAPHIC]

18

19 b. Bangladesh's OCS Claim: the proposal and its justification

20 33. In doing so, let me start with a number of points on which, according to India, the
21 parties agree.

1 **Points of agreement**

2 *A single continental shelf*

3 34. The first of these is that “there is in law only a single “continental shelf” rather than
4 an inner continental shelf and a separate extended or outer continental shelf.”⁷¹

5 Now that is true, but it requires some explanation.

6 35. I start with the history -- to this Tribunal of the kindergarten variety, in which it was
7 possible to get 104 percent but nonetheless worth recalling.

8 (a) In the beginning of course we have the Truman Proclamation, which
9 instituted a single continental shelf of limited but never fixed extent.

10
11 (b) Then there was the 1958 Geneva Convention on the Continental Shelf, with its
12 regime following the Truman Proclamation, but again with no fixed outer limit. The one
13 element of the 1958 Convention which did not follow the Truman Proclamation (Article 6
14 on delimitation) was the one element the Court held in 1969 did not reflect customary
15 international law. Since then courts and tribunals have consistently refused to prefer
16 equidistance above an equitable solution, even though the modalities of achieving such a
17 solution have been developed and to some extent standardised.

18
19 (c) Third, and in parallel, and for a long time as a matter of customary international law
20 rather than multilateral treaty, we saw the gradual development of the EEZ. From its first
21 Latin manifestation in 1946, the EEZ included seabed resources, giving rise to a
22 concurrence between the shelf and the zone.

23

⁷¹ *Delimitation of Maritime Boundary between Barbados and Trinidad & Tobago*, Award, 11 April 2006, reprinted in 27 RIAA 147, para. 213.

1 (d) In the grand synthesis of 1982 with the EEZ (Part 5) and Continental Shelf (Part 6),
2 but allowed also for the extension of the geomorphological shelf beyond 200 miles
3 according to criteria laid down in Article 76. It should be stressed that the role of the CLCS
4 is essentially technical, not judicial: it makes recommendations which take effect if
5 implemented in accordance with the Convention. This role should not prevent tribunals
6 from delimiting beyond 200 miles in situations where there is no doubt about the
7 underlying entitlement. It did not prevent ITLOS from doing so in the *Myanmar* case.

8
9 36. In retrospect it might have been simpler if the EEZ regime had applied exclusively
10 within 200 miles with the continental shelf relegated to a role beyond 200 miles.
11 But that was not what was done; proposals to that effect were repeatedly rejected
12 during UNCLOS III.⁷² It was already clear then that the *lex lata* of the continental
13 shelf would have to coexist with the *lex ferenda* of the EEZ, as the Court described
14 it in 1974.⁷³

15 37. This explains the jurisprudence on the single maritime boundary within 200 miles.
16 Courts and tribunals have sought to produce the same delimitation results within
17 200 miles without merging the two regimes. On occasions this has led to curiosities
18 such as in *Jan Mayen*, the modification of a shelf boundary within 200 miles by
19 reference to the fisheries considerations.⁷⁴ But the distinctness of the shelf from
20 the zone has otherwise been maintained and such outcomes are to be explained
21 either by the consent of the parties to a single maritime boundary or by the relative
22 indifference of outcomes as concerns shelf rights as compared with fisheries.

⁷² See, S.Nandan et al., eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. II (2002), pp. 844-848, para. 76.5.

⁷³ ICJ Reports 1974 pp. 23-24, para. 53.

⁷⁴ *Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, ICJ Reports 1993, p.38, at para. 76.

1 38. Thus there is only one continental shelf in the sense that each state has a single
2 continental shelf. This cannot hide the reality that there is a different *regime*
3 beyond 200 miles (where geomorphology dominates) as compared within 200
4 miles (where geomorphology is irrelevant). This explains why the Court has twice
5 stopped a delimitation at 200 miles without prejudice to subsequent delimitation
6 beyond. If India were right, there would never be any need to stop: the line laid
7 down within 200 miles would just keep right on trucking, to use perhaps
8 inappropriate land-based terminology.

9 39. What are the common features of the continental shelf regime within 200 miles and
10 beyond?

11 (1) First, the principle of *ipso jure* appurtenance is the same: there is no need to claim
12 continental shelves; States have it already.

13
14 (2) Second, the resources covered are the same, as is the notion of sovereign rights over
15 such resources.

16
17 (3) Thirdly, the *principle* of delimitation is the same (Article 83), but the incidence of
18 delimitation may be different -- I will return to this.

19
20 40. What are the distinguishing features of the continental shelf regime within 200
21 miles and beyond?

22 (1) One, all coastal states which are not totally shelf-locked have a continental shelf
23 beyond 200 miles by operation of law – sorry, within 200 miles by operation of law

1 | irrespective of geomorphology & exploitability. In contrast, beyond 200 miles the right to
2 | a continental shelf has to be established in accordance with Article 76.

3 |
4 | (2) Whereas the 200 miles delimitation may be constrained by the concurrence of
5 | EEZ considerations (as it was in *Jan Mayen*) this is not true beyond 200 miles where only
6 | considerations pertinent to the shelf and its resources will apply.

7 |
8 | (3) It is only beyond the 200-mile zone that resource exploitation is subject to the
9 | revenue provisions of Article 82.

10 |
11 | (4) And four, to take a point of some local relevance, Article 11 of the Final Act applies
12 | only to continental shelf beyond 200 miles and only to states in the Bay of Bengal.

13 |
14 | 41. The parties are agreed that the equitableness of a given continental shelf
15 | delimitation has to be assessed throughout its whole length and not just in a given
16 | segment. This is part of the meaning of the idea that there is a single continental
17 | shelf. But as I have demonstrated, equitableness even if achieved within 200 miles
18 | does not entail equitableness overall, and particularly not in this geographical
19 | situation. Likewise the mere continuation of whatever delimitation line drawn
20 | within 200 miles does not necessarily achieve equity overall. In the present case
21 | there is room for an equitable solution by modification of the line beyond 200
22 | miles, unlike the situation with the Myanmar/Bangladesh delimitation. The
23 | question for this Tribunal -- it is perhaps the critical question -- is how to achieve
24 | overall equity by a delimitation beyond 200 miles, given that international law does
25 | not require the mere continuation of a line drawn within.

1 *Both parties have entitlements beyond 200 nm*

2 42. I turn to the second point on which the parties agree, which is that they both have an
3 entitlement to continental shelf beyond 200 miles. Given the geomorphology of
4 the Bay of Bengal this cannot be doubted -- and it was clearly accepted by ITLOS
5 in the Myanmar case. India has not contested that the area of overlapping
6 potential entitlement beyond 200 miles extends to the whole area which
7 Bangladesh can claim consistently with Article 76. That area might be more
8 extensive than the area claimable within 200 miles, which might be affected by
9 inshore considerations -- promontories or concavities -- irrelevant further out. Or
10 it might be constrained by geomorphology beyond 200 miles and never get to the
11 stipulated maximum outer limits. Both possibilities require separate
12 consideration.

13 *Article 83 UNCLOS is applicable to delimitation beyond 200 nm*

14
15 43. The third point which India identifies as agreed is that the same rule of delimitation
16 -- in Article 83 -- applies within and beyond 200 miles. Again the point requires some
17 elaboration.

18 44. Faced with Indian rigidity as to equidistance, it is necessary to stress the flexibility
19 of the Article 83 formula. It doesn't require the 200-mile limit to be ignored if it's
20 somehow relevant. Take the case of a single maritime boundary within 200 miles
21 determined essentially by fisheries considerations where there is hydrocarbon
22 prospectivity beyond 200 miles.

1 45. In short, once entitlement is established, there is no reason why existing principles
2 of continental shelf delimitation should not apply. One of these is a strong
3 presumption that states are not shelf-locked: the Federal Republic of Germany
4 upheld its right to a shelf out to the agreed median line with the United Kingdom
5 and well beyond the dictates of equidistance.⁷⁵ The same should apply to states
6 with a frontage on the 200-mile line. The same principle should apply to states
7 with a frontage on the 200-mile line.

8 *Under Article 83 the equidistance/relevant circumstances method is applicable to this*
9 *delimitation*

10 46. India's fourth point of agreement is that under Article 83 the equidistance/relevant
11 circumstances method is applicable beyond as well as within 200 miles—it says,
12 “following Bangladesh's volte-face” on the point. The Tribunal may recall what
13 Mark Twain said when he was told his obituary had been published in the *New York*
14 *Times*, he described the report of his death as somewhat exaggerated. Well, the
15 same description would apply to Bangladesh's alleged *volte face*.

16 47. First, it's very clear from Bangladesh's written pleadings and from Professor
17 Boyle's presentation, Bangladesh does not accept that the equidistance/relevant
18 circumstances method should be applied beyond 200 miles in the present case.

19 48. Secondly, even if it did, it would not produce India's equidistance boundary.

⁷⁵ *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, at para. 101.

1 49. Thirdly, even if it did produce an equidistance boundary within 200 miles, it would
2 not necessarily produce one beyond that limit. Here the game changes or can
3 change, with consequences for delimitation to which we will now turn.

4 **Bangladesh's delimitation proposal for the outer continental shelf**

5 Mr. President, Members of the Tribunal:

6 50. It follows from all I have said that delimitation beyond 200 miles requires separate
7 judicial or arbitral consideration. It is not predetermined or pre-empted by delimitation
8 within 200 miles, still less where such delimitation is predicated on remote, unstable, not to
9 mention hypothetical base points – base points posited against a background of concavity
10 in which inequity increases with distance from the coast. One can imagine a case where a
11 coastal state was severely constrained in the available extent of continental shelf within
12 200 miles, for example, by lying within a gulf with other coastal states crowded on each
13 side, but where beyond the gulf the area of outer continental shelf was essentially at large,
14 or gave many more opportunities for an equitable solution. In such a case it would not be
15 right, nor consistent with Article 83, to require that coastal state, the coastal state as it were
16 at the back of the gulf, to continue unnecessarily bearing the burden of disadvantage in
17 distant open waters which it was required to bear inshore. In those open waters it is not
18 shelf-locked. And that is this case! True, the ITLOS decision in the *Myanmar* case
19 alleviated the situation to a certain extent. I will return to the point in due course -- for the
20 present it is enough to say that despite India's insistence on equidistance lines, the point is
21 not determined by your decision, whatever it is, within 200 miles.

22

1 [GULF OF FONSECA MAP]

2
3 51. A certain analogy can be found in the Gulf of Fonseca, where the Chamber was
4 influenced by the idea of representation of all three coastal States in the closing line across
5 the Gulf (this is **Tab 3.18**). The Chamber stated:

6 “The coast of a bay is for this purpose the closing line of the
7 bay, for the waters inside are claimed in sovereignty. Since the legal
8 situation on the landward side of the closing line is one of joint sovereignty,
9 it follows that all three of the joint sovereigns must have entitlement outside
10 the closing line to territorial sea, continental shelf and exclusive economic
11 zone. This must be so, both in respect of continental shelf rights belonging
12 *ipso jure* to the three coastal States, and in respect of an exclusive economic
13 zone which requires proclamation....”⁷⁶

14
15 And the Chamber went on to hold:

16 “entitlement to territorial sea, continental shelf and
17 exclusive economic zone seaward of the central portion of the closing line
18 appertains to the three States of the Gulf, El Salvador, Honduras and
19 Nicaragua; and that any delimitation of the relevant maritime areas is to be
20 effected by agreement on the basis of international law.”⁷⁷

21
22 [END GRAPHIC]

23

⁷⁶ ICJ Reports 1992 para 420.

⁷⁷ *Ibid.*, p. 617.

1 52. Now, of course, I accept that the analogy between the closing line of a historic
2 multistate bay and the outer limit of a 200-mile continental shelf/EEZ line is not close.
3 But there are indications in both judicial and state practice of a desire to ensure that coastal
4 states are not precluded by considerations of equidistance from access to the outer
5 continental shelf.

6 [St PIERRE & MIQUELON PROJECTION]

7
8 53. As to judicial practice, I refer in particular to the southward projection of the coastal
9 frontage of the islands of St Pierre and Miquelon in the *Canada/France* arbitration, which
10 is at **Tab 3.19**. The effect is that the French islands are represented on the 200-mile line.
11 There is also the decision of the International Court in *Nicaragua/Colombia*. The
12 Nicaraguan coast is represented on the 200-mile line irrespective of equidistance. And of
13 course there is *Bangladesh/Myanmar*, the partly hidden meaning of which it is for your
14 Tribunal to resolve.

15 [END GRAPHIC]

16
17 54. State practice in this area is still developing, and there is not much that relates to
18 delimitation of substantial continental coastlines in areas of overlapping claims to outer
19 continental shelf. So far these are tri- and bilateral agreements which utilise a
20 smorgasbord of solutions. There is little or no consistency: some follow a simple, single
21 method (such as continuance of an azimuth or modified equidistance), others a mix of
22 different solutions.

1 55. It is precisely in such circumstances that it is the role of a competent tribunal -- your
2 Tribunal -- to develop the law appropriately. In such cases it is not enough, as India will
3 no doubt protest, to say that a decision would be “unprecedented” or unsupported by law.
4 This is very much a case of first impression, by definition unprecedented, and your making
5 the law is as inevitable as your speaking prose – it not being suggested you should fashion
6 your award in blank verse hexameters.

7 56. I suggest three specific criteria, based on the practice I have sketched, on the
8 jurisprudence and on the literature. First, any delimitation should equitably share the
9 burdens of the situation, given overlapping entitlements. Secondly, the principle of
10 maximum reach should as far as possible be observed: that is to say, no state represented on
11 the 200-mile line should be unavoidably shelf-locked beyond it, so far as its entitlement
12 extends. Third, the delimitation should as far as possible avoid cutting off any other party
13 from its own similar entitlement.

14 [SHOW DELIMITATION PROPOSAL]

15
16 57. On this basis, Bangladesh’s proposal is for a corridor, the width of Bangladesh’s
17 frontage on the outer continental shelf, to the limit of Bangladesh’s shelf in accordance
18 with Article 76. The corridor would involve parallel lines between the western boundary
19 and the ITLOS boundary. That’s at **Tab 3.20**. This proposal is consistent with both the
20 letter and the spirit of the ITLOS judgment. It complies with each of the three specific
21 criteria I have just articulated. It equitably shares the burdens of the situation, having

1 regard to the overlapping entitlements. It observes the principle of maximum reach. It
2 does not involve any excessive cut-off of any other party from its similar entitlements.

3 [END GRAPHIC]

4 [SHOW FOLLOWING TABLE]

5 Mr. President, Members of the Tribunal:

6 58. 1. A comparison of India's and Bangladesh's proposals for outer continental
7 shelf delimitation yields the following picture (**Tab 3.21**):

8

9

10

Table 2

Bangladesh's Claim

	India	Bangladesh	Myanmar
Coastal frontage (km)	708 (to Sandy Point)	424	587 (to Cape Negrais)
OCS frontage after Bangladesh's delimitation (km)	395	142	259
Actual area of OCS after Bangladesh's claim (km ²)	43,070	25,250	36,060
Coastal frontage : OCS frontage (percentage)	56%	33%	44%
OCS frontage: Actual OCS after Bangladesh's claim (km ²) (ratio)	1 : 109	1: 178	1: 151
Actual OCS after Bangladesh's claim	35%	37%	41%

(km ²)/Area of OCS submitted to CLCS (km ²) (percentage)	(NB: overlap with Myanmar)		(NB: overlap with India)
COMPARE: Actual OCS after India's claims (km ²)/Area of OCS submitted to CLCS (km ²) (percentage)	104.8%	1.35%	18.6%

1

2 59. It is no doubt a mistake to pay too much attention to precise numbers, but whereas
3 India's position involved something close to complete domination, Bangladesh's is much
4 more balanced. When taken in conjunction with the delimitation within 200 miles, it
5 passes the third-phase proportionality test, a matter which Mr. Martin will demonstrate.

6 [END GRAPHIC]

7

8 **India's criticisms of Bangladesh's delimitation proposal**

9 60. India makes a number of criticisms of Bangladesh's proposed outer continental
10 shelf delimitation, and I now turn to these.

11 61. First, it says that the proposal is "purely arbitrary and lacks legal basis", paragraph
12 7.16 of the Rejoinder. As to lacking legal basis, I have already shown that is not true. Of
13 course these problems of outer continental shelf delimitation before tribunals are largely
14 novel, and they call for the combination of wisdom, good judgment and sensitivity to
15 competing considerations which all judging requires, notably in developing areas of law.
16 But the legal basis is to be found in Article 83, and the mandate it gives for you to decide in

1 | accordance with equity *infra legem*. Equidistance does not become the law of the
2 | continental shelf just because the delimitation problem is new.

3 | 62. As to being “purely arbitrary”, that is again not the case. This is a public
4 | arbitration -- public in the sense of performed under public law. It’s argued by competent
5 | counsel, I hope, before an experienced tribunal which will give reasons for its decision.
6 | Particular aspects of maritime delimitation involve the selection of numbers and bearings,
7 | the division and allocation of areas and the appreciation of general ideas such as
8 | proportionality. In the end you have to produce a precise line which satisfies the
9 | less-than-crystalline criteria of Article 83. It would be idle to pretend that there are not
10 | other lines which would also be possible or defensible. But what India does is to take
11 | refuge in the easy complaint of arbitrariness to support a wholly indefensible position --
12 | one in which its relevant coastline has 150 times the generative power of Bangladesh’s.
13 | That cannot be right.

14 | **SHOW RJ 7.2**

15 |
16 | 63. Secondly, India complains that the proposal “blocks the outward projection of both
17 | the south-facing and south-east-facing coasts of India”; in other words, it complains of
18 | cut-off. It illustrates this cut-off in its Figure RJ 7.2 which is in **Tab 3.22**. This is one of
19 | the few graphics to grace the relevant chapter of the Rejoinder. It shows an impoverished
20 | subcontinent cowering before the mighty, long extension of Bangladesh’s southeast facing
21 | coast.

1 [SHOW OUR SERIES OF GRAPHICS BASED ON RJ 7.2]

2

3 64. But it is trite law that in situations of overlapping potential entitlement all solutions
4 involve some degree of cut-off, and this is the case here, as the following slides illustrate.
5 Bangladesh too is cut off, by the ITLOS line and by the potential effect of equidistance in a
6 situation of pronounced concavity. But one has to look at the overall situation, in which
7 the only access of Bangladesh to the limits of the outer continental shelf is a rather narrow
8 corridor. How narrow is for you to decide. Seen in the overall geographical context, as
9 in the Figure shown on the screen, India has little or nothing to complain of, with expanses
10 of uninterrupted continental shelf hundreds of miles in length.

11 END GRAPHIC

12

13 65. Then India complains that such arguments imply that the Tribunal “is called upon
14 to delimit the whole of the Bay of Bengal”, observing that the present case was “clearly”
15 not joined to the *Myanmar* case -- as if it might have been unclearly joined!

16 66. Joinder would no doubt have been desirable in the best of all possible integrated
17 and judicial worlds -- but Part XV of UNCLOS is very far from that subset of worlds. The
18 Tribunal will be aware that the reason there was no joinder (despite the fact we offered and
19 India rejected). But non-joinder is not the same as oblivion, and the Tribunal, three of
20 whose members sat on the *Myanmar* case and who sit unchallenged here, must be able to
21 take into account the reasoning and result in that case. Equally you are permitted to take

1 | into account other delimitations in the region, and the overall geographical implications of
2 | your decision for the very special case of the Bay of Bengal.

3 | 67. I have already referred to the limited state practice on outer continental shelf
4 | delimitation. A number of these cases are discussed in the pleadings: while they give
5 | some support to the principle of maximum reach, the situations are very different from the
6 | one you face, and they are correspondingly of limited value.

7 | **Conclusions**

8 | 68. For these reasons, Bangladesh submits that an equitable solution to the delimitation
9 | of the outer continental shelf is a corridor, the western limit of which starts where the
10 | maritime boundary within 200 miles meets India's 200-mile line and which proceeds along
11 | a line paralleling the maritime boundary with Myanmar, until it reaches the outer limit of
12 | Bangladesh's continental shelf.

13 | Mr. President, Members of the Tribunal, thank you for your attention.

14 | Mr. President, I would now ask you to call on Mr. Martin.

1 PRESIDENT WOLFRUM: Thank you, Professor Crawford, for your
2 statement.

3 Professor Shearer has a question.

4 ARBITRATOR SHEARER: Mr. Crawford, before you leave the podium,
5 can I just ask for your clarification of a point that you made in distinguishing between
6 delimitation of the continental shelf within 200 miles and beyond 200 miles. If I wrote it
7 down correctly, you said that, according to Article 76 of the Convention, rights of the
8 continental shelf beyond 200 nautical miles need to be claimed. But is that exactly what
9 Article 76 says? It certainly says that where your natural continental shelf which inures to
10 the coastal State automatically goes beyond 200 miles, you have to establish the outer
11 limits of that claim. Is that the same thing? I know that your argument puts forward other
12 equities and so on which would differentiate the areas of continental shelf within and
13 beyond 200 miles, but is it true that a State would have to claim additional continental shelf
14 beyond 200 miles?

15 I would appreciate a clarification, thank you.

16 PROFESSOR CRAWFORD: I hope I did not say it needed to be claimed
17 in the sense in which the EEZ needs to be claimed. It has to be justified, which is different.

18 ARBITRATOR SHEARER: Yes.

19 PROFESSOR CRAWFORD: That pertains ipso jure, as I said, both within
20 and beyond 200 miles. But a State only has it beyond 200 miles, whereas a State has a
21 200-mile continental shelf if it has coastal frontage. Beyond 200 miles it only has a
22 continental shelf in accordance with Article 76.

1 It's not necessary that that assertion--because it is an assertion--under
2 Article 76 be approved in advance by the CLCS. It's in this case conceded by both Parties
3 that the whole relevant area falls within the scope of Article 76. The continental shelf is
4 inherent, both within and beyond 200 miles, and the question of delimitation then has to be
5 resolved. But the extent of continental shelf beyond 200 miles can raise separate
6 considerations.

7 ARBITRATOR RAO: Thank you, Professor Crawford, for your
8 elaboration of the entitlements beyond 200 miles of the continental shelf rights of coastal
9 States.

10 Do I understand that States have an inherent entitlement beyond 200
11 nautical miles irrespective of the delimitation process and the delimitation process, and that
12 the delimitation process, therefore, follows to allow the maximum of these entitlements, or
13 is it a delimitation process that allows certain--and taking into consideration the equitable
14 factors would result in that maximum entitlement? Which comes first?

15 PROFESSOR CRAWFORD: Thank you, sir.

16 The position is in continental shelf delimitation generally is entitlement
17 comes before delimitation. The entitlement is to the area of maximum potential
18 entitlement but subject to delimitation. And there is a theology here which, like all
19 theologies, has developed in a certain way. The maximum potential entitlement beyond
20 the frontage on to the 200-mile line was determined by Article 76 without reference to any
21 numbers, directions or anything else. And as I have established, there is no rule that the
22 line of delimitation within 200 miles is simply continued. It may be equitable, it may be

1 not--it's a separate process--any more than there is a rule that the line of delimitation
2 extends out to sea. So, the amount of continental shelf that you actually get depends on
3 delimitation, but the underlying entitlement is already there, as I said, in response to
4 Professor Shearer.

5 PRESIDENT WOLFRUM: Thank you, Professor Crawford.

6 I see there are no further questions. Therefore, we will now listen to
7 Mr. Martin, please.

8 MR. MARTIN: Good afternoon, Mr. President, Members of the Tribunal.

9 Well, I have seem to draw the short straw this afternoon. It's my
10 unenviable task to follow James Crawford, or at least try, and that's what I will now do.

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PERMANENT COURT OF ARBITRATION

***Bay of Bengal Maritime Boundary
Arbitration between Bangladesh and India***

Lawrence H. Martin

Bangladesh’s Proposed Boundary Is Not Disproportionate

10 December 2013

VII. Introduction

1. Good afternoon, Mr. President, Members of the Tribunal. Well I seem to have drawn the short straw this afternoon. It’s my unenviable task to follow James Crawford, or at least try, and that’s what I will not do. Mr. President, my job this afternoon in rounding out Bangladesh’s first-round presentation is to show that the maritime boundary Bangladesh proposes easily passes the last step of the delimitation process: the disproportionality test. It therefore constitutes the equitable solution that UNCLOS requires.

2. My colleagues -- my friends -- have already presented our arguments as to why the maritime boundary Bangladesh proposes is equitable within the meaning of Articles 74 and 83. My role now is to show that the solution we have presented is not inequitable; that is the purpose of the disproportionality test. In the words of the

1 International Court of Justice in the recent *Nicaragua-Colombia* case, the
2 disproportionality test is merely intended “to ensure that there is not a disproportion
3 so gross as to ‘taint’ the result and render it inequitable”.⁷⁸

4 3. Happily, this is a point on which Bangladesh and India are in express
5 agreement. I refer to paragraph 7.31 of the Indian Rejoinder. One necessary
6 consequence is that it will invariably *not* be the case that only one boundary will pass
7 the disproportionality test. In fact, there may be a number of possible boundaries
8 that do so. The primary reasons that justify the adoption of any particular line are
9 therefore matters to be weighed well before the subject of disproportion is raised.
10 And it is precisely those reasons that you have heard already articulated by my
11 colleagues.

12 4. I turn then to the two constituent elements of the disproportionality test: (1)
13 the relevant coasts; and (2) the relevant area. In its Reply, Bangladesh presented its
14 approach to these two issues by reference to the ITLOS Judgment which, for obvious
15 reasons, we consider an appropriate touchstone for this case as well. It’s therefore
16 useful to recall the manner in which ITLOS dealt with these same issues.

17 5. On your screens now is Sketch-map No. 8 from the Judgment. You can see
18 the relevant coast of Bangladesh depicted in green and the relevant coast of Myanmar
19 in red. The relevant area is portrayed in orange. There are three points in
20 particular about this sketch-map to which I would like to draw your attention.

21 6. *First*, the relevant coast of Myanmar extends well beyond 200 miles from
22 Bangladesh. The first segment of the Myanmar relevant coast shown in red is
23 almost exactly 200 miles in length. All of the second segment, which itself

⁷⁸ *Nicaragua v. Colombia*, para. 242.

1 | measures another 117 miles, therefore lies more than 200 miles from Bangladesh. In
2 | fact, Mr. President, you may recall that Bangladesh argued in that case -- and lost --
3 | that Myanmar's relevant coast should not extend more than 200 miles from
4 | Bangladesh. Myanmar, through many of the same counsel now appearing for India,
5 | argued the opposite.

6 | 7. *Second*, and relatedly, the relevant area includes areas that are more than 200
7 | miles from Bangladesh but within 200 miles from Myanmar. You can see that on the
8 | screens now. These first two points are significant for reasons that will become clear
9 | quickly.

10 | 8. *Third*, the relevant area also includes areas that are beyond 200 miles from
11 | both States. These are depicted on the screens now. This image is at Tab 3.23 of
12 | your folders. This area of outer continental shelf corresponds roughly to the area of
13 | bilateral overlapping claims in the OCS between Bangladesh and Myanmar. The
14 | reasons this matters will also become evident very quickly.

15 | **VIII. The Relevant Coasts**

16 | 9. With those elements of introduction, I come then to the issue of the relevant
17 | coasts. As ITLOS stated in its 2012 Judgment, "for a coast to be considered as
18 | relevant in maritime delimitation it must generate projections which overlap with
19 | those of another party."⁷⁹ Essentially the same formulation was used by the ICJ in
20 | its recent judgment in *Nicaragua-Colombia*. It referred to the relevant coasts as
21 | "those coasts the projections of which overlap".⁸⁰

⁷⁹ *Bangladesh/Myanmar*, para. 198.

⁸⁰ *Nicaragua v. Colombia*, para. 141.

1 10. Whatever else might be said about this formulation, Mr. President, it is not
2 exactly a model of precision. But the truth is, it needn't be. The disproportionality
3 inquiry is designed to yield only an approximate check against inequity. It is applied
4 on the basis of numbers that, in the words of the ICJ, "do[] not purport to be precise
5 but [are] only approximate".⁸¹ Moreover, the circumstances of every case will
6 necessarily be different; they are to be evaluated in accordance with the particularities
7 of the geographic setting. And that, in our minds, is precisely why the model
8 adopted by ITLOS in its 2012 Judgment is so instructive. The geographic setting is
9 quite comparable; here we are dealing with the other side of the same coin.

10 11. As I just showed, the ITLOS Judgment considered relevant portions of the
11 Myanmar coast beyond 200 miles from Bangladesh, presumably because they so
12 plainly fronted onto -- or projected into -- the area to be delimited, including the area
13 beyond 200 miles. Beyond Cape Negrais, Myanmar's coast turns sharply to the east
14 into the Gulf of Martaban. It therefore does not generate projections that overlap
15 with those of Bangladesh.

16 12. Bangladesh sees no reason to adopt a different approach in this case. Indeed,
17 it would be rather anomalous to do so, given the geographic similarities of the case
18 and the overlap between the tribunal in that case and the tribunal in this case.

19 13. Just as ITLOS found the entire coast of Bangladesh relevant in the Myanmar
20 case, so too it is relevant here. The entire coast of Bangladesh plainly projects into
21 the area to be delimited. On this point, even India agrees.⁸² The Bangladesh
22 relevant coast is depicted on your screens now. We have simply adopted the manner
23 in which ITLOS measured the length of the Bangladesh coast. Whereas, ITLOS

⁸¹ *Ibid.*, para. 158.

⁸² IR, para. 3.14.

1 | previously measured it as 413 km, Bangladesh measures it at 424 km. The
2 | difference is the result of the inclusion in Bangladesh's calculation of a segment of
3 | the Raimangal Estuary extending to the land boundary terminus. In any event, the
4 | difference is small enough that it makes no difference in the final calculation.

5 | 14. The real difference between the Parties is on the length of India's relevant
6 | coast. Consistent with the ITLOS' Judgment, Bangladesh considers that the relevant
7 | coast of India should extend the entire length of coast that faces onto the area to be
8 | delimited, including the area beyond 200 miles. As described in Bangladesh's
9 | written pleadings, and discussed further by Professor Crawford, Bangladesh's coast,
10 | by virtue of Article 76, projects well beyond 200 miles to the limit of its claim in the
11 | outer continental shelf. The limit of Bangladesh's claim as submitted to the CLCS is
12 | portrayed on the screens now.

13 | 15. That being the case, we think the relevant coast of India defines itself. The
14 | portion of the coast projecting into -- or facing onto -- the same areas into which
15 | Bangladesh's coast projects extends to Sandy Point, marked now. I should say that
16 | in depicting this, we have simply copied the manner in which India itself measured
17 | the first three segments of its coast. All we've done is add an additional segment
18 | extending to Sandy Point. Beyond Sandy Point, India's coast fronts onto other areas
19 | of the Bay, including areas beyond 200 miles, where there is no overlap with
20 | Bangladesh. Bangladesh calculates the length of India's relevant coast to be 708 km
21 | measured from the land boundary terminus.

22 | 16. India rejects this view of its relevant coast, arguing that it should stop after
23 | only 411 km at Devi Point, a location the Tribunal will recall from our flyover in the
24 | C-130 on 24 October. According to the Indian Rejoinder at paragraph 3.22:

1 “The relevant coasts are readily definable to determine
2 overlapping projections up to the 200-nautical mile limit under Article 76(1) of
3 UNCLOS. For Bangladesh to seek an extension of India’s relevant coast with
4 an additional stretch of coastline based on presumed extensions beyond 200
5 nautical miles, without Bangladesh having any corresponding relevant coast has
6 no legal basis.”⁸³ (at para. 3.22)

7 17. Bangladesh offers three responses to this. *First*, India is just wrong when it
8 says Bangladesh’s approach has no legal basis. Frankly, the claim mystifies us a bit,
9 since our legal basis is the ITLOS Judgment. We think that is not only sufficient
10 but, in fact, rather compelling.

11 18. *Second*, India seems to suggest that the relevant coasts should be determined
12 by reference to overlapping projections up to -- but not beyond -- the 200 nm limit.
13 That truncation of perspective is wholly artificial. The area in dispute in this case
14 includes substantial areas that are beyond 200 miles. Indeed, it is one of the most
15 critical issues in dispute. That being the case, the relevant coasts must also include
16 the coasts that project into those areas.

17 19. *Third*, the fact that the length of Bangladesh’s relevant coast does not grow by
18 virtue of the inclusion of zones beyond 200 miles is irrelevant here. Bangladesh is
19 pinched between its two neighbours on either side; there is no additional coast to be
20 added. India, however, is not so limited. As the area to be delimited extends into
21 the outer continental shelf, so too does the length of India’s relevant coast grow.

22 20. We therefore think that 708 km is the right measure of India’s relevant coast.
23 The ratio to the length of Bangladesh’s 424 km relevant coast is therefore **1.67:1** in
24 favour of India. This image is at Tab 3.24 of your folders.

⁸³ IR, para. 3.22.

1 **IX. The Relevant Area**

2 21. That brings me to the second element of the disproportionality test: the
3 relevant area. As with the relevant coasts, our guidepost for addressing this issue
4 has been the 2012 ITLOS Judgment. The key take-away from that Judgment, we
5 say, is that the relevant area must also include areas beyond 200 miles. To adopt any
6 other approach would be to ignore one of the key questions this Tribunal has been
7 asked to answer; namely, the extent of the areas beyond 200 miles over which each of
8 the Parties will be able to exercise the sovereign rights provided for in the
9 Convention.

10 22. In this respect, it is critical to reiterate that India has never -- not ever --
11 disputed Bangladesh's potential entitlement in the outer continental shelf. Nor could
12 it. As set forth in our Memorial, the facts establishing that potential entitlement are
13 just too obvious to be contested. The only question then is over how much of that
14 potential entitlement Bangladesh will be permitted to exercise its sovereign rights?

15 23. That being the case, the limits of the relevant area on at least two sides draw
16 themselves. *First*, in the east, the relevant area must be limited by the delimitation
17 line decided by ITLOS. To the east of that line, Bangladesh can and does make no
18 claim. *Next*, to the south, the relevant area is circumscribed by the limit of
19 Bangladesh's claim in the outer continental shelf as submitted to the CLCS. While
20 those limits have yet to be made the subject of final recommendations, they are
21 nevertheless adequate for the approximate purposes at hand.

22 24. *Lastly*, there is the question of the limit of the relevant area in the southwest.
23 We say the most natural and obvious way to close off the relevant area here is simply
24 to connect Sandy Point, by means of a perpendicular line, to the point on

1 Bangladesh's outer limit that is closest to the Indian coast. That is depicted on your
2 screens now. The size of the relevant area so defined is 366,854 sq km. This
3 image is at Tab 3.25 of your folders.

4 25. India disagrees with this depiction of the relevant area, evidently because it
5 includes some areas that, while within 200 miles of India, are beyond 200 nm from
6 Bangladesh. For this, we offer two observations. Number one, as we saw at the
7 beginning of my presentation, Bangladesh's approach is entirely consistent with the
8 ITLOS Judgment. The relevant area does indeed include some areas that are within
9 200 miles of India, but beyond that distance from Bangladesh. But so too did the
10 relevant area in *Bangladesh/Myanmar*. This is therefore not a principled basis on
11 which to object. Number two, and relatedly, it seems to us that it would be rather
12 curious to exclude zones located immediately in front of India's relevant coast from
13 the determination of the relevant area, as India seems to suggest.

14 26. The alternative depiction of the relevant area that India offers is deeply flawed
15 and flatly inconsistent with the ITLOS Judgment. This is the relevant area according
16 to India. The problems are immediately obvious. Most conspicuously, the
17 Tribunal will notice the comparatively large scale at which this sketch-map has been
18 drawn. The purpose is obvious: to hide from view the fact that India's relevant area
19 does not include any maritime spaces beyond 200 miles. This image is at Tab 3.26.
20 As I have discussed, there can be no justification for this omission. The delimitation
21 in the outer continental shelf is a critical disputed issue, and it cannot simply be
22 ignored out of existence. Moreover, the ITLOS Judgment makes clear that the area
23 beyond 200 miles must be included.

1 27. In addition, India provides no explanation for its curious choice to limit the
2 relevant area in the southwest by means of a line drawn at an acute angle between
3 Devi Point and a very northerly point on the Indian 200 nm limit that is not even
4 controlled by Devi Point, but rather by a point on India's deltaic coast. If Devi Point
5 is indeed to be considered the limit of India's relevant coast, it would seem far more
6 logical to include also in the relevant area those areas within 200 nm of India that are
7 controlled by Devi Point. You can see those on your screens. As you can see, this
8 area far more accurately portrays the area of overlapping projections emanating from
9 the Indian coast up to Devi Point than does India's proposed relevant area.

10 28. In any event, for the reasons I have mentioned, we say Bangladesh's definition
11 of the relevant area is more faithful both to the geographical circumstances of this
12 case and, not coincidentally, the 2012 ITLOS Judgment.

13 29. All that remains for me to do, Mr. President, is to assist you with a few
14 numbers. The ratio of relevant coastal lengths is, as I said, **1.67:1** in favour of India.
15 The total relevant area measures somewhat over 366,000 sq km. Using the maritime
16 boundary my colleagues have described -- that is, the 180° line projecting from the
17 land boundary terminus to the 200 nm limit, and then along the 214° azimuth to the
18 limit of Bangladesh's claim in the OCS -- using that boundary to divide this area
19 would mean approximately 145,000 sq km for Bangladesh and 221,000 sq km for
20 India. The ratio is **1.52:1** in favour of India. This image is at Tab 3.27. Although
21 Bangladesh receives *marginally* more maritime area than a strictly and formally
22 proportionate allocation would give it, the difference is immaterial, and certainly not
23 nearly enough to be considered disproportionate within the meaning of the law. The
24 solution Bangladesh proposes is therefore entirely equitable.

1 30. Just by way of comparison, India’s proposed equidistance solution would
2 divide the relevant area by a ratio of **3.44:1** in India’s favour. This image is at Tab
3 3.28. In other words, India would receive more than two times the maritime area
4 than a strictly proportionate delimitation would entitle it. Whether or not this
5 disparity rises to the level of a “gross disproportion” sufficient to create inequity is
6 not an issue this Tribunal needs to decide. The simple point is merely that
7 Bangladesh’s proposal is far more balanced when considered in view of the
8 underlying realities of this case that my colleagues have described. It plainly
9 achieves an equitable solution, whereas India’s proposal certainly does not.

10 31. Mr. President, Members of the Tribunal, that brings me to the close of my
11 comments this morning, and it brings us to the close of Bangladesh’s first-round
12 presentations with one exception. Our answer to the question of the Tribunal posed
13 to Bangladesh yesterday. For that purpose, I would ask you, Mr. President, to call to
14 the podium Dr. Robin Cleverly of the United Kingdom Hydrographic Office.

15 I, and all of us on the Bangladesh team, thank you very much for your
16 very kind attention.

17 **X. Tribunal question to Bangladesh (Monday 9 December, 2013)**

18
19 *Because the latitude/longitude grid on British Admiralty chart 859 has*
20 *significantly moved between the 1931 and 1953 editions (shown in the*
21 *Bangladesh written pleadings [Figures R3.6 and R3.7]), the Tribunal*
22 *would appreciate knowing how the WGS-84 coordinates of the land*
23 *boundary terminus claimed by Bangladesh were computed.*

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1 **XI. Answer from Bangladesh (Tuesday 10 December, 2013)**

2
3 1. The Tribunal's question raises two distinct technical matters.

4
5 2. As regards the movement of the latitude/longitude grid between the 1931 and
6 1953 editions of BA859, there is a shift westwards of about 0.5M. This movement
7 was the result of updates to the chart, although no changes to charted data were
8 made in the area of the Raimangal estuary. Bangladesh places no reliance on the
9 1953 edition, except to illustrate Commander Kennedy's report.

10 3. As regards the manner in which the WGS-84 coordinates of the land boundary
11 terminus claimed by Bangladesh have been computed, the horizontal datum of
12 the 1931 edition of BA859 is not ascertainable from the original survey material
13 (a circumstance not unfamiliar to charts of that vintage). The coordinates for the
14 land boundary terminus proposed by Bangladesh are based on the grid used in the
15 1931 edition of BA859, but their conversion to WGS84 was carried out by a
16 standard practice where no datum is available, namely comparing selected control
17 points on the 1931 edition of BA859 with the more recent 2011 edition of BA 859
18 (which is referenced to WGS84). An average shift was calculated as +0.074'N,
19 -0.109'E. The conversion was carried out by correlating physical features as
20 depicted on both editions of the chart, and accordingly the adjustment in the
21 latitude/longitude grid has no significant or material consequences.

22 4. Neither of these matters raised by the Tribunal affects the reliability of the
23 1931 edition of BA859.

24 5. Bangladesh is available to offer further assistance to the Tribunal on this
25 technical matter.

1 MR. CLEVERLY: Thank you, Mr. President.

2 PRESIDENT WOLFRUM: Thank you, Mr. Cleverly, for your clarification
3 in answering our question. Thank you very much.

4 This brings us to the end of the first part of the Bangladesh presentations, and
5 we will meet again on Thursday at 2:00, and then we start with India, and we will continue
6 in this way of presentations as we did so far. Thank you very much.

7 (Whereupon, at 12:47 p.m., the hearing was adjourned until 2:00 p.m.,
8 Thursday, December 12, 2014.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

DAVID A. KASDAN